(26,931)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 291.

THE UNITED STATES OF AMERICA *EX REL.* JENNIE JOHNSON ET AL., PLAINTIFFS IN ERROR,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 Court of Appeals of the District of Columbia.

No. 3157.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON et al., Appellants,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Supreme Court of the District of Columbia.

At Law. No. 58265.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, Mary F. Street, Formerly Mary Fanny Johnson; Jennie B. Wallace, Formerly Jennie Belle Johnson, and Jennie Johnson, as Next Friend of Walter Johnson and John B. Johnson, Minors, Petitioners,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 *Petition for Mandamus.*

Filed July 23, 1915.

In the Supreme Court of the District of Columbia.

Law. No. 58265.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, Mary F. Street, Formerly Mary Fanny Johnson; Jennie B. Wallace, Formerly Jennie Belle Johnson, and Jennie Johnson, as Next Friend of Walter Johnson and John B. Johnson, Minors, Petitioners,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Respondent.

Your petitioners respectfully represent:

1. That they are citizens of the United States and blood Indian members of the Creek Tribe of Indians in the State of Oklahoma, and bring this action in their own right except as hereinafter set forth.

2. That the respondent, Franklin K. Lane, is a citizen of the United States, temporarily residing in the District of Columbia, and is an officer of the Government of the United States and Secretary of the Interior in said Government by mediate succession to the Secretary of the Interior, Ethan A. Hitchcock, hereinafter mentioned.

3. That to Ethan A. Hitchcock, as Secretary of the Interior, or such of his assistants as said Hitchcock might designate, was committed by Congress under certain laws hereinafter referred to, the duty of final action on applications for citizenship in the Creek Nation of Indians, or approving the enrollment of those applicants whom he should deem entitled to be placed on the final rolls of members or citizens of the Creek Tribe or Nation of Indians and of allotting the lands and distributing the funds of the Creek Tribes or Nation of Indians to each and all persons who should be placed on the final rolls of members or citizens of said Creek Tribe or Nation of Indians.

4. That by certain treaties and agreements between the United States and the Creek Nation of Indians, the Creek Nation ceded to the United States the lands granted to it by treaties with the United States east of their present home in exchange for the lands whereon said Nation now resides. That by the treaty between the United States and the Creek Nation of February 14, 1833, proclaimed April 12, 1834 (7 Stats. 417) the lands occupied by the Creek Nation, and in which lands your petitioners as citizens had equal undivided interests, were given or granted to the said Creek Nation by the United States in fee simple. That Article 3 of the said Creek treaty aforesaid provides as follows:

3 "Article 3. The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and the Senate of the United States and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

5. That said Indians and their heirs entitled to share in the tribal lands and funds under the treaties referred to have not become extinct and have not abandoned the said land or any part thereof, but, on the contrary, the reversionary interest of the United States in said lands has been terminated and surrendered to said Indians by certain Acts of Congress, treaties and agreements having for their purpose the division in severalty of the lands of the Creek Indian citizens of said Creek Tribe and their descendants. That your petitioners and those as heirs of whom they bring this action were long recognized as citizens of said Creek Tribe, and your petitioners aver that they and each of those herein named were recognized and adjudged by the Secretary of the Interior to be members of said Creek Nation, and as such each entitled to have a vested right in a lawful allotment of land in the Creek Nation allotted to him or them and to receive an equal undivided distributive share in the funds of the Creek Nation.

6. That under the provisions of various acts of Congress, a Commission of the Five Civilized Tribes was created for the purpose among other things of making agreements with each of the Five Civilized Tribes for the division in severalty among their citizens or members of the lands held by them in common, of enrolling under the direction and approval of the Secretary of the Interior the members or citizens of every one of the Five Civilized Tribes, and of allotting in severalty in fee simple to the members of the Creek Nation the lands held by said Nation as hereinbefore set forth. That under the provisions of said acts of Congress, of agreements effected in accordance therewith and of treaties between the United States and said Indian tribes, rolls of members of each of the tribes were directed to be prepared by said Commission under the supervision of the Secretary of the Interior from time to time, and it was provided that when the enrollment of any person as a member of any one of the Five Civilized Tribes should be approved by the Secretary of the Interior, his or her name should be placed on the final approved roll of said tribe and he or she thereby become and be entitled to an allotment, in the Creek Nation of 160 acres of land in said Nation, and to the other rights and privileges common to citizens of said Nation.

That by the Act of June 10, 1896 (29 Stats. 321-29) it was provided:

"That the rolls of citizenship of the several tribes as now existing are hereby confirmed."

And that either the Commission to the Five Civilized Tribes or the legally constituted Court or Committee on citizenship of the

several tribes should determine, after hearing, the applica-
4 tions of persons claiming right to be admitted and enrolled in the several Nations, and that either the Tribe or any person aggrieved by any decision of the tribal authorities or the Commission to the Five Civilized Tribes should have the right to appeal within a limited time from such decision to the United States District court, whose decisions should be final, and the rolls thus prepared, it was provided,—

"shall be and are hereby made rolls of citizenship of said Nation or Tribe."

and should be filed with the Commission of Indian Affairs—

"to remain there for use as the final judgment of the duly constituted authorities."

That by the Act of June 7, 1897 (30 Stats. 62-84) it was provided that the words "rolls of citizenship" as used in the Act of June 10, 1896,—

"shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the Nation and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added thereto by the council of such nation, the duly constituted courts thereof, or the Commission under the Act of June 10, 1896."

It was provided that all other names appearing upon such rolls, and not confirmed by the Act of June 10, 1896, as herein construed, might within six months from the passage of the Act be stricken from the rolls—

"where the party affected shall have 10 days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such Nation: Provided, however, that the person so stricken from the rolls should have a right of appeal to the United States District Court."

That by the Act of June 23, 1898 (30 Stat., 495-503) it was provided:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made. * * *

"The rolls so made when approved by the Secretary of the Interior shall be final and the persons whose names are found thereon with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several Tribes which they represent."

That by the Act of May 13, 1900 (31 Stats., 221-236) it was provided that the Commission—

"shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe of the Indian Territory who has not been recognized as a citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

That by the Act of March 3, 1901 (31 Stats. 1058-1077) it was provided:

"That rolls made by the Commission to the Five Civilized Tribes when approved by the Secretary of the Interior shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said Tribes or either of them for closing said rolls, but upon failure to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

That by the agreement between the United States and the Creek Nation of Indians approved March 1, 1901, it was provided:

"Sec. 28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, 1899, entitled to be enrolled under section 21 of the Act of Congress approved June 28, 1898, * * * shall be placed upon the rolls to be made by said Commission under said act of Congress, or if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

7. That in all the legislation of Congress and agreements with the Creek tribe of Indians enacted pursuant to the policy of the United States to divide the Creek lands in severalty it was provided that the enrolment of persons on the Indian rolls of said tribes should be according to the very right and merit of the matter, and that they should be enrolled as members of the Creek tribe of Indians in the event that they were Creek Indians by blood and were resident in the Creek Nation prior to and at the time of the original legislation for the making of rolls of said Creek Indians by the United States and continued to reside among said Creek Indians. That provision was made for the recognition of the authenticated Creek Indian rolls made prior to any suggested division of lands or funds and

6 no jurisdiction was conferred on the United States district courts to consider the right to enrolment of persons on such rolls but authority was conferred on the Secretary of the Interior to consider and enrol the names of all such persons if still living, and it was directed that he should enrol all persons on said rolls and their descendants.

That the names of your petitioners Jennie Johnson and Fanny Johnson appear on the authenticated Creek roll of 1890. That in 1883 Jennie Johnson, who is a one-eighth Creek Indian by blood and who removed to and continued to live in the Creek Nation, was admitted to citizenship in the Creek Nation by the district court of the Creek Nation and her name placed on the aforesaid roll of 1890 by Act of the Creek Council. That the other petitioners hereto are her children and as such lawfully entitled to the same rights as herself. That the name of the petitioner Jennie Johnson being on an authenticated Creek Indian roll there was no jurisdiction or authority in the Commission to the Five Civilized Tribes under the Act of 1896 except to transfer the names of petitioners on the rolls of the Creek Nation prepared by the Government of the United States as a preliminary to allotment of lands to the Creek Indians. That nevertheless the Commission to the Five Civilized Tribes undertook in violation of law to refuse enrolment in 1896 to your petitioners. That an appeal was taken to the district court for the Indian Territory, but there is no record of any decision by said court therein. That in 1905 the Secretary of the Interior decided that where the name of an Indian was borne on any authenticated Indian roll neither the Commission to the Five Civilized Tribes nor the district court had any authority to deny such person or her children enrolment and that the action in denying enrolment was void. That the petitioners thereupon made application for enrolment on the Creek Indian rolls under the Act of June 28, 1898, and the later acts hereinbefore referred to and after testimony duly taken with notice and opportunity to be heard given and afforded to all parties entitled, including the Creek Nation, the United States and claimants your petitioners were held entitled to enrolment by the Commission to the Five Civilized Tribes. That this action was taken without any fraud, concealment or artifice on the part of any of the petitioners and after an investigation of the rolls containing the name of your petitioner Jennie Johnson. That under the statutes, rules, regulations, practice and custom in such matters said decision was duly promulgated and notice given to all parties in interest. That under said statutes, rules, regulations and practice an appeal lay from said decision of the Commission to the Five Civilized Tribes to the Commissioner of Indian Affairs and from the decision of said Commissioner of Indian Affairs to the Secretary of the Interior by any party aggrieved. That the statutes, rules, regulations and practice provided for notice and an opportunity to be heard at every stage of procedure including therein the right within a named time to file a motion for rehearing or review of the decision of the Secretary of the Interior in any enrolment case in the Creek Nation, all parties in interest having the right to notice and an opportunity to be heard.

That the practice and custom in enrolment matters in the Five Civilized Tribes was for the Commission to the Five Civilized
7 Tribes where there was no contest of the right to enrolment of an applicant to place his or her name on a roll for approval and said roll then was transmitted and was stamped approved and signed by the Secretary of the Interior or one of his Assistant Secretaries. Where a contest against the right to enrolment of the applicant was made no roll according to the uniform usage and practice was prepared by the Commission to the Five Civilized Tribes, but a decision was promulgated and said decision and the record in the case transmitted to the Commissioner of Indian Affairs and thence to the Secretary of the Interior and the decision thereon of the Secretary treated as final and determinative of rights and the rolls thereafter prepared as a ministerial act by the Commissioner to the Five Civilized Tribes if the applicant was held entitled to enrolment and the roll stamped approved and signed by the Secretary of the Interior as a matter of course and of right upon presentation of the same. That in no case whatsoever prior at least to the fifteenth day of February, 1907, was a person, adjudged after a contest, entitled to enrolment by the Secretary of the Interior, denied enrolment on an approved roll without notice and an opportunity to be heard.

8. That no appeal was taken from the aforesaid decision of the Commission to the Five Civilized Tribes holding petitioners entitled to enrolment or of the Commissioner of Indian Affairs affirming said decision. That on the 19th day of February, 1907, the Secretary of the Interior formally held that petitioners and each of them were entitled to enrolment as Indian blood members of the Creek Nation and in order to expedite the ministerial work of preparing the rolls containing their names said decision of the Secretary of the Interior Ethan A. Hitchcock was communicated direct to the Commission to the Five Civilized Tribes, and it was directed forthwith to prepare rolls containing the names of your petitioners and each of them as Indian blood members of said Creek Nation. That no motion for rehearing or review of said decision was filed and no appeal from a similar favorable decision of the Commissioner of Indian Affairs ever was taken. That notwithstanding said decision and notwithstanding the statutes, rules, regulations, customs, and practice in such matters without any notice to petitioners and without any opportunity to be heard the Secretary of the Interior on the 4th day of March, 1907, the day of the closing of said rolls by law, did in denial of the right of petitioners to due process rescind his decision of February 19, 1907, and did reverse the decision of the Commissioner of Indian Affairs rendered on the 25th day of September, 1906, holding petitioners entitled to enrolment and did direct that the names of petitioners should not be enrolled on final Indian blood rolls of the Creek Nation. That on the 4th day of May, 1907, your petitioners at the first opportunity or knowledge they had of the action taken did apply to the Secretary of the Interior to set aside the aforesaid order of March 4, 1907, and place their names on the approved rolls, but the Secretary of the Interior

refused so to do and held that after March 4, 1907, there was
8 no jurisdiction in him to take any action with respect to said rolls. Your petitioners state that the action taken by the Secretary of the Interior as aforesaid on the 4th day of March, 1907, was arbitrary, illegal, without notice to or opportunity to them or any of them to be heard, and that said action was erroneous as matter of fact and of law. That as your petitioners are informed and therefore aver the said action of the Secretary of the Interior in rescinding the decision in favor of petitioners was taken hastily and without due consideration and was taken because the cases of your petitioners and of each of them as to their right to enrolment, were erroneously and hastily supposed to come within an opinion rendered on, to wit, the 19th day of February, 1907, by the Attorney General of the United States in the case of one Lulu West, an applicant for citizenship in the Choctaw Nation of Indians, laws with reference to which said nation of Indians were different in material respects from the statutes governing enrolments and allotments in the Creek Nation. That none of your petitioners were parties to the cause wherein said opinion was rendered by the Attorney General in the case of Lulu West or any other cause or matter pending before said Attorney General and had no notice, hearing nor opportunity to be heard in the aforesaid case of Lulu West. That your petitioners and each of them deny their right to enrolment was dependent on or controlled by the right to enrolment of said Lulu West and your petitioners further state that they are informed that it is conceded by the Secretary of the Interior that there was a misapplication on March 4, 1907, to the cases of your petitioners of the aforesaid Lulu West opinion. That in the case of said Lulu West the facts were that Lulu West never had been on any tribal roll and that it was held that not having been on any tribal roll there was a right in 1896 of the Commissioner to the Five Civilized Tribes to reject her application for enrolment, and of the Choctaw-Chickasaw Citizenship Court to affirm said action, and that their decision by the express terms of the statute was final and her case thereupon res judicata and not open to consideration upon a later application whereas in the cases of your petitioners their names were on an authenticated Indian tribal roll, there was no citizenship court in the Creek Nation as in the Choctaw-Chickashaw Nations, their rights were open to consideration in 1905, 1909 and 1907 *to consideration* by the Secretary of the Interior and subordinate tribunals and your petitioners were by said Secretary and his subordinates duly found to be of Creek Indian blood, to have resided in the Creek Nation as required by law in order to be entitled to enrolment, to have been on the authenticated Creek Indian roll of 1890 and to have been recognized as a member of the Creek tribe by the Creek National Council. That none of your petitioners were given any notice of the said opinion of the Attorney General of February 19, 1907, or that the cases of your petitioners were under consideration or review, and no notice was given to them or hearing afforded them or opportunity granted to them to show, as they lawfully could have done and now it is admitted can do that their cases were not similar to

that of said Lulu West and that their right to enrolment was
9 not depended on or controlled by her right to enrolment and that the opinion of the Attorney General aforesaid was not applicable to the cases of your petitioners.

9. That in, to wit, the month of February, 1910, the Secretary of the Interior admitted that your petitioners rightfully and lawfully should have been enrolled prior to the 4th day of March, 1907, on the Creek Indian rolls, and reported their cases to the Chairman of the Senate Committee on Indian Affairs as cases of unusual merit, but deemed himself unable by reason of his interpretation of the law with respect to the closing of the rolls to afford relief. That your petitioners as matter of law and right, by reason of the proceedings aforesaid had in law and in fact, acquired such status, privileges and rights, that they are entitled by order of the court to have their names placed on the Creek Indian rolls, and accorded the status of Creek Indians by blood, with all the rights and privileges thereunto appertaining, respondent having heretofore refused to enrol them or recognize them as such.

10. That your petitioner Jennie Johnson brings this suit as heir at law of Clarence Johnson, who died on the 19th day of February, 1900, entitled to enrolment rights in the Creek Nation under the laws in such cases made and provided. His rights to lands and funds in said Creek Nation under the statutes governing in such matters descended to the petitioner Jennie Johnson, and she brings this suit in her own right as heir at law of Clarence Johnson as to so much of this petition as relates to the said Clarence Johnson. That the petitioners, John B. and Walter Johnson, were born June 3, 1904 and ——, respectively, and under the statutes in such cases made and provided, are entitled to enrolment and allotment of lands and funds in the Creek Nation, and your petitioner brings this suit as next friend of her infant sons, the aforesaid John B. Johnson and Walter Johnson.

Wherefore, inasmuch as the Honorable Franklin K. Lane, Secretary of the Interior, has refused to place the names of your petitioners on the approved rolls of members or citizens by blood of the Creek Nation, to recognize your petitioners as entitled to the status of members by blood of the Creek Nation invested with all the rights and privileges thereunto appertaining including the right to make lawful selections of allotments of the Creek Nation lawfully available for allotment, and to recognize your petitioners as entitled to share in the tribal funds of the Creek Nation of Indians and, as the law provides no other adequate remedy in the premises whereby your petitioners can be protected in their lawful rights, whereof they are now unjustly and arbitrarily and unlawfully deprived, your petitioners pray:

1. That a writ of mandamus may be issued and directed to the Honorable Franklin K. Lane, Secretary of the Interior, commanding him to place the names of your petitioners and each of them or cause the same to be placed on the approved rolls of the members or citizens by blood of the Creek Nation, and to accord to your peti-

tioners the status and the rights belonging to blood members on the approved rolls of the Creek Nation of Indians.

10 2. For such other and further right or rights or relief as to the Court may seem proper and the nature of the case of your several petitioners may require.

And as in duty bound, your petitioners will forever pray.

JENNIE JOHNSON.

CHAS. H. MERILLAT,
FRANKLIN & CAREY,
Att'ys for Petitioners.

COUNTY OF HAMILTON,
State of Texas, ss:

Before the subscriber, a notary public in and for the County of Hamilton, State of Texas, on the 14th day of July, 1915, personally appeared Jennie Johnson, personally well known to me, who made oath on the Holy Evangels of Almighty God that she is one of the above named petitioners; that she has read the foregoing petition subscribed by her and knows the contents thereof and that the facts as set forth in said petition are true to the best of her knowledge and belief. Witness my hand and official seal this 14th day of July A. D. 1915.

[SEAL.]

H. E. CHESLEY,
Notary Public in and for Hamilton County, Texas.

Notary Public. Hamilton, Texas. My Commission expires June 30th, 1917.

Return to the Rule to Show Cause.

Filed September 17, 1915.

* * * * * * *

Comes now Franklin K. Lane, Secretary of the Interior, and by way of return to the rule to show cause why writ of mandamus should not issue as prayed by relators in their petition in the above-entitled cause, says:

That while not denying that relators may possess some quantum of Creek Indian blood, he denies that they are blood Indian members of the Creek tribe of Indians, as averred in Paragraph 1 of the petition, or that they are at all members of said tribe, and, on the contrary, says that, as in and by the petition aforesaid appears, the names of the relators were never placed upon an approved roll of citizens of the Creek tribe or nation of Indians and were not upon any such roll approved by the Secretary of the Interior at or prior to March 4, 1907. That the facts are as follows:

In 1896, application was made to the Commission to the Five Civilized Tribes for the enrollment of the relators under the act of June

10, 1896; that said application was denied by said Commission and on appeal to the United States court for the northern district
11 of Indian Territory, the action of said Commission was affirmed; that on further appeal said decision of said United States court was affirmed by the Supreme Court of the United States (174 U. S. 445); that thereafter and in the year 1900 application was again made to said Commission by said relators, and said application was denied May 11, 1901, the Department of the Interior affirming said decision January 29, 1902; that thereafter, however, on motion made in behalf of the relators the case was reopened and a further hearing had; that thereafter, to wit, on September 25, 1906, the Commissioner of the Five Civilized Tribes rendered a decision in favor of relators and, upon February 19, 1907, the Secretary of the Interior, upon the recommendation of the Commissioner of Indian Affairs, affirmed this decision; that in pursuance thereof, said decision remaining unrevoked, respondent says that in due and regular course a roll bearing the name- of the relators and such other Indians who appeared to possess the right of enrollment as citizens of the Creek Tribe or Nation of Indians and entitled as such to a share in the distribution of the tribal lands and funds would have been prepared and presented to the Secretary of the Interior for his final consideration and action by way of approval or disapproval; that under the provision of law governing the right of citizenship, enrollment, and participation in the distribution of tribal funds and property, only those whose names were upon final rolls of citizenship duly approved by the Secretary of the Interior were entitled to allotments of land and share in the other property of the tribe.

He further avers, however, that said decision of February 19, 1907, never became final and was never promulgated; that no copy thereof was ever transmitted to the relators herein nor to any agent or representative of said relators or either of them and never passed beyond the control of the Secretary of the Interior; that said decision had been mailed to the Commissioner of the Five Civilized Tribes at Muskogee, Oklahoma, and in ordinary and regular course of procedure, if not recalled or vacated, would have been delivered to the relators or some of them or to their attorneys or representatives, but that before such delivery and before any official notification of the rendition of any such decision had been given to relators or any of them or to any agent, attorney, or representative, or either of them, and within four days after this Department had affirmed the decision of the Commissioner of the Five Civilized Tribes, favoring the enrollment of the relators as aforesaid, the Commissioner of the Five Civilized Tribes was instructed by telegram, on, to wit, February 23, 1907, to inspect the partial rolls of the Creek Nation and other nations of the Five Civilized Tribes, with a view of determining whether any names thereon should be stricken therefrom because of an opinion of the Attorney General of the United States, rendered on February 19, 1907; that thereafter and on February 27, 1907, and for the reason that in his judgment the case of the relators was within the purview and effect of said decision of the Attorney General, the

12 Commissioner of the Five Civilized Tribes recommended that his decision of September 25, 1906, aforesaid, favorable to the claims of the relators be not concurred in by the Secretary of the Interior and that the decision of May 11, 1901, aforesaid, rendered by the Commission to the Five Civilized Tribes denying enrollment to the relators be allowed to stand; that thereafter and on March 1, 1907, the closing of the rolls of citizenship, by operation of law on March 4, 1907, being imminent, the said Commissioner again by telegram recommended that the application of the relators for enrollment be denied; whereupon, on March 4, 1907, the Secretary of the Interior rescinded the action of February 19, 1907, aforesaid, and in the exercise of his judgment and discretion, feeling and holding that the relators were not entitled to enrollment as Creek citizens under and by reason of the opinion of the Attorney General aforesaid, he reversed the Commissioner's decision of September 25, 1906, and affirmed that of the Commission of May 11, 1901.

Answering the averment in paragraph 7, as set forth on page 7½ of the petition, he says that the decision of the Commission or Commissioner to the Five Civilized Tribes therein referred to in cases where the right of enrollment was contested, was merely tentative and advisory in its nature, designed to inform the Secretary of the Interior of the ultimate facts and the views of the Commission, or Commissioner as to right of enrollment of applicants in the case submitted, and to invoke authority from the Secretary to include the names of such applicants upon a roll later to be submitted for the Secretary's approval or disapproval; and he denies that the decision of the Secretary in such a case, affirming the views of the Commission, or Commissioner, was final and determinative of the rights of the applicants, but that such decision merely afforded authority to said Commission or Commissioner to inscribe the names of such applicants upon a roll later to be submitted to the Secretary for his approval or disapproval. And he avers that in the case of the relators it nowhere appears in the petition herein filed, by averment or by inference, that the names of the relators were ever put on any roll prepared as aforesaid by the Commissioner, pursuant to the Secretar,'s action of February 19, 1907, but on the contrary, he states the fact to be that relators' names were not enrolled on any such roll, and that, as heretofore averred, the Commissioner on February 27, 1907, himself recommended the rescission of the Secretary's action that would have authorized him to place the names of the relators on such a roll.

He denies that relators were recognized and adjudged by the Secretary of the Interior to be members of said Creek Nation and as such entitled to have any land of said nation allotted to them or to receive any equal distributive share of the funds of said nation.

He respectfully shows that relators were therefore never enrolled in the manner required by law as citizens of the Creek Nation; that their names were never on any roll approved by the Secretary of the Interior at any time and especially prior to the time, to wit, March 4, 1907, when the Secretary of the Interior had jurisdiction to approve or disapprove a roll containing the names of those who

were thereby, upon his approval of said roll, to become Creek citizens entitled to allotment of land and distribution of monies; and that by reason of the facts recited herein, as aforesaid, the relators never acquired the status of enrolled citizens or the right to become such, but on the contrary when their application for enrollment was before the Secretary of the Interior and before he had taken final action in respect thereto by duly approving a roll containing their names, the Secretary acting within the power conferred on him by law and in the exercise of his discretion to approve or disapprove, upon final consideration rejected the claim of the relators, denied their application, rendered final decision against them, and failed to approve any roll containing their names as citizens of said tribe; that the final action taken by the Secretary of the Interior was and remains adverse to the claims and pretentions of relators and that said action was taken while the Secretary yet had jurisdiction in the premises.

He further shows that Congress by the second section of the act of April 26, 1906 (34 Stat., 137), provided:

That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

He therefore respectfully represents that he is, and since March 4 1907, has been without jurisdiction to enroll the relators as citizens of the Creek Nation or to recognize them as having the status of members by blood or otherwise of said Creek Nation invested with the rights and privileges belonging to citizens whose names are on the approved rolls of said nation or to accord them, as prayed in relators' petition, the rights belonging to blood members on said approved rolls of said nation.

Wherefore, having made full and complete return to the rule to show cause herein issued, he prays that said rule may be discharged and the petition herein filed may be dismissed with his reasonable costs and that he may be permitted to go hence without delay.

FRANKLIN K. LANE,
Secretary of the Interior.

PRESTON C. WEST,
Solicitor for the Department of the Interior.

C. EDWARD WRIGHT,
Assistant Attorney.

DISTRICT OF COLUMBIA, *ss:*

Franklin K. Lane, Secretary of the Interior, being first duly sworn, says that he has read over the foregoing answer by him subscribed and knows the contents thereof; that the matters and things therein set forth he is informed are true and he believes them to be true.

FRANKLIN K. LANE,
Secretary of the Interior.

14 Subscribed and sworn to this 17" day of September, 1915.
Before me:

[SEAL.] W. BERTRADE ACKER,
Notary Public in and for the District of Columbia.

Amendment to Petition.

Filed September 23, 1915.

* * * * * * *

Come now the petitioners and amend their petition filed in the above entitled cause by inserting in the seventh paragraph of their petition after the words: "roll of 1890 by act of the Creek Council" the following: "That such tribal enrolment was free from fraud and was duly made according to Creek laws and customs."

And by adding in paragraph eight of the petition after the words: "Was taken hastily and without due consideration and was taken" the following: "solely and only."

And by adding at the end of paragraph eight of the petition the following:

"That said action was not taken or based upon any finding or conclusion that the names of petitioners or any of them had been placed on the tribal rolls by fraud or without authority of law but solely because of the denial of enrollment of your petitioners by the Commission to the Five Civilized Tribes or the District Court on appeal under the act of 1896."

JENNIE JOHNSON ET AL.,
Petitioners.

W. C. FRANKLIN,
C. H. MERILLAT,
Attorneys.

(Endorsed.)

Leave to file granted.

WALTER I. McCOY.
Justice.

Stipulation Amending Return.

Filed September 25, 1915.

* * * * * * *

It is hereby stipulated and agreed that by way of answer to relators' petition as amended with leave of court on this 23rd day of September, 1915, the respondent's return may be, and the same is hereby, amended by the addition of the following matter:

Answering the averment of paragraph 7 of the petition as amended, that the name of Jennie Johnson was placed on the

Creek roll of 1890 by act of the Creek Council, and that such tribal enrollment was free from fraud and was duly made according to the Creek laws and customs, the respondent says that he has no knowledge or information on which to predicate a belief that such enrollment was free from fraud and made in accordance with the laws and customs of the Creek Nation, but states that as a fact, the names of Jennie Johnson, Clarence Johnson and Fannie Johnson were found upon the 1890 authenticated Creek roll and are not found on a later roll made in 1895; that in the year 1895 said names were stricken from said rolls by the Committee of Eighteen of the Creek Nation.

That answering the averments of paragraph 8 of the petition as amended, whereby relators aver that the action of the Secretary of the Interior in rescinding the decision in favor of petitioners was taken solely and only because the acts of said petitioners were supposed to come within the purview of the opinion of the Attorney General of the United States, rendered on February 19, 1907, respondent says that he has no information as to the reasons for the Secretary's said action, other than the records of the Department disclose; that said records show that on February 19, 1907, the First Assistant Secretary addressed a communication to the Commissioner to the Five Civilized Tribes at Muskogee in words and figures as follows:

September 25, 1906, you resubmitted the record in the matter of the application of Jennie Johnson for the enrollment of herself and her four minor children, Clarence, Fanny, Jennie Belle, and Walter Johnson, as citizens of the Creek Nation, together with your decision holding that the applicants are entitled to enrollment.

Reporting February 15, 1907 (Land 85000-06), the Indian Office recommends that your decision be approved. A copy of its letter is inclosed.

Your decision is hereby affirmed. The papers in the case and a carbon copy hereof have been sent to the Indian Office.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

That thereafter and on February 23, 1907, the Secretary addressed a telegram to the Commissioner to the Five Civilized Tribes in words and figures as follows:

"To Bixby, Commissioner, Muskogee, I. T.:

You are directed to inspect the partial rolls of citizens of the Choctaw and Chickasaw Nation to determine what persons have been enrolled thereon contrary to the views expressed by the attorney general in opinion of February 19 copy sent you this day and whose names should be stricken therefrom. You will furnish the department a list of such names with roll numbers and give such information that it may readily determine whether such names should be stricken from the rolls. This information should reach the de-

partment before March first take like action relative to the rolls of Cherokee and Creek Nations. It was held in such opinion among other things that the decision- of the Commission under act
16 of 1896 not appealed from were final, and that the decisions of the Choctaw and Chickasaw citizenship court were final whether claimant's name was on tribal rolls or not. Decisions of the Department based upon opinions of the *assistant* general in favor of claimants in the cases of Loula West et al., William C. Thompson et al. and Richard B. Collman et al. are rescinded in letter to you of this day the decision of the department in the Ethel Pierson case minor child of a Choctaw freedman is sustained in the opinion of the attorney general.

E. A. HITCHCOCK,
Secretary."

That thereafter and on February 27, 1907, the said Commissioner addressed a communication to the Secretary of the Interior in words and figures as follows:

Muskogee, Indian Territory,

February 27, 1907.

The Honorable the Secretary of the Interior.

"Sir: The Department under date of April 11, 1906, rescinded its action of January 29, 1902, affirming the decision of the Commission to the Five Civilized Tribes dated May 11, 1902, denying the application of Jennie Johnson for the enrollment of herself and her four minor children, Clarence, Fanny, Jennie Belle and Walter Johnson, as citizens of the Creek Nation, and instructed that said case be reopened in order that applicants might be heard upon the merits of the same in line with the opinion of the Assistant Attorney General of January 31, 1905, in the Creek citizenship case of R. F. Barber.

In accordance with Departmental instructions, said case was reopened and further testimony was introduced in same. A new decision was prepared in said matter and signed by the Commissioner September 25, 1906, granting the application for the enrollment of said applicant which said decision, together with the record in the case, is now before the Department for consideration. The Department under date of February 23, 1907, telegraphed this office as follows:

(Here follows the text of the telegram of February 23 aforesaid.)

In view of the facts in the case as set out in said decision of the Commissioner and in view of the instructions of the Department as contained in said telegram, I would respectfully recommend that the decision of the Commissioner, under date of September 25, 1906, be not concurred in and that the former decision of the Commission, under date of May 11, 1902, be allowed to stand.

Respectfully,

TAMS BIXBY,
Commissioner.

That thereafter and on March 1, 1907, said Commissioner addressed a telegram to the Secretary in words and figures as follows:

"Secretary of the Interior, Washington, D. C.:

Referring to Departmental letter of February nineteen, nineteen hundred and seven (I. T. D. 3650-1907), affirming decision of the Commissioner in Creek enrollment case of Jennie Johnson, et al., your attention is invited to report of this office of February twenty-seventh relative to said case in which recommendation was made that applicant be denied in view of opinion of Attorney General of February nineteen, nineteen hundred and seven.

BIXBY,
Commissioner."

That thereafter and on March 4, 1907, the Secretary of the Interior addressed a communication to the Commissioner to the Five Civilized Tribes at Muskogee, in words and figures as follows:

On March 2, 1907 (Land 21218), the Indian Office transmitted your report, dated February 27, 1907, with reference to the application of Jennie Johnson for the enrollment of herself and four minor children, Clarence, Fanny, Jennie Belle and Walter Johnson, as citizens of the Creek Nation.

On February 19, 1907, the Department affirmed your decision, dated September 25, 1906, favorable to these applicants.

You now recommend that in view of the opinion of the Attorney-General, dated February 19, 1907, in the cases of Loula West, and others, your decision of September 25, 1906, be not concurred in and that your former decision of May 11, 1902, be allowed to stand.

In accordance with your recommendation, departmental letter of February 19, 1907, is hereby rescinded, and your decision of September 25, 1906, is hereby reversed.

If these applicants have been placed upon the roll of citizens of the Creek Nation, their names are hereby cancelled from said roll, and you are authorized to strike their names from the copy of the roll in your possession. The Indian Office will take like action, and the Department will also take such action.

Your decision of May 11, 1902, is hereby affirmed.

A copy of Indian Office letter is enclosed herewith. Your letter has been returned to the Indian Office, together with a copy thereof.

Respectfully,

E. A. HITCHCOCK,
Secretary.

That as to the matters averred in the last paragraph of petitioners' amendment to their petition, the respondent says that he has no information beyond that contained in the official records, as above quoted and set forth.

It is further stipulated and agreed that the relators' demurrer t the return may stand, and the same is hereby taken as a demurre to the return as amended by this stipulaton.

PRESTON C. WEST,
C. EDWARD WRIGHT,
Attorneys for Respondent.
CHARLES H. MERILLAT,
W. C. FRANKLIN,
Attorneys for Relator.

18 *Demurrer.*

Filed September 25, 1915.

* * * * * * *

Petitioner says that the answer filed by the respondent in th above entitled cause is bad in substance.

W. C. FRANKLIN,
CHARLES H. MERILLAT,
Attorneys for Petitioner.

NOTE.—One matter to be argued on demurrer is that the answe shows a denial of due process of law to petitioner.

Opinion.

Filed February 26, 1916.

* * * * * * *

This is a petition for a writ of mandamus to require Frankli K. Lane as Secretary of the Interior to place the names of the peti tioners or cause the same to be placed on the approved rolls of th members or citizens by blood of the Creek Nation, and to accord t the petitioners the status and rights belonging to blood member on the approved rolls of the Creek Nation of Indians. An amende petition was filed and the Secretary has filed an answer and amende answer to which the petitioners demur.

Jennie Johnson is the mother of the other relators who claim a her children. The five Civilized Tribes of Indians were independ ent sovereignties prior to the Appropriation act of March 3, 189 wherein provision was made for the Dawes Commission, which wa to treat with them for the purpose of securing an allotment and di vision of their tribal lands and other property.

The Indian Appropriation Act of June 10, 1896, (29 Stat. 339) provided among other things that the Commission should determin the application of all persons who might apply for citizenship i any of said nations and determine within ninety days after appli cation made the right of such applicants to be so admitted and en rolled. This act further provided that the rolls of citizenship the existing should be confirmed but further provided that any perso

who claimed to be entitled to be added to said rolls as a citizen of either of the tribes and whose right had been denied or not acted upon, or any citizen who desired citizenship might apply within three months after the passage of the act to the legally constituted court or committee designated by the several tribes for such citizenship and that such court or committee should then determine such application within thirty days from the date thereof. Enrollment by the Commission would lead to participation in the distribution of the lands and moneys of the tribes. An appeal to the United States District Court was also provided.

19 The relator, Jennie Johnson, who is one-eighth Creek Indian by blood, and Mary F. Street have resided in the Creek Nation since 1883 and were admitted to Creek citizenship by a District Court of the Creek Nation, and when the per capita payment of 1890 was made to the Creek Nation they participated in that payment.

The relators made application under the Act of 1896 to the Commission for enrollment as members by blood of the Creek Nation, but the Commission having heard their evidence denied their application. An appeal was had by the relators, first to the United States Court for Indian Territory, where the Commission was sustained in its action, and finally to the Supreme Court of the United States, where the United States District Court's decision was affirmed. The opinion of the Supreme Court is in 174 U. S. at page 445.

The Indian Appropriation Bill of June 7, 1897, (30 Stat. 62) enlarged the authority of the Commission, and also provided that so far as any names previously appearing on the rolls were concerned, unless they had been absolutely confirmed by antecedent legislation, they should be stricken from the rolls by the Commission.

The Act of June 28, 1898, (30 Stat. 495) known as the "Original Curtis Act," provided for the completion of the tribal rolls; prescribed with considerable detail the duties and powers of the Commissions in making such rolls and provided with reference to the Creek Indians in part as follows:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes." * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

In 1900, the problem of the final settlement of the affairs of the tribes not being disposed of, the relators applied to the Dawes Commission for enrollment under the Act of 1898, which application was again denied May 11, 1901, and the action of the Commission was affirmed by the Secretary of the Interior, January 29, 1902.

The Act of Congress of March 1, 1901, (ratified by the Creek Nation, May 25, 1901) provided that all citizens living on the first day of April, 1899, entitled to be enrolled under the Act of June 28, 1898, should be placed on the rolls to be made by said Commission. The rolls, so made, when approved by the Secretary of the Interior, were to be the final rolls of citizenship of the tribe, upon which the allotment of all lands and distribution of all moneys and other property of the tribe were to be made.

The Dawes Commission was later abolished, having practi-
20 cally completed its work, and all its powers became vested in the Secretary of the Interior.

The work of enrollment and allotment having neared completion, an Act of Congress approved April 26, 1906, (34 Stat. 137) provided that after the approval of the Act no person should be enrolled as a citizen or freedman except as therein provided, and provided for certain additions to the rolls. This Act also contained the following provision:

"Provided that the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior, shall have no jurisdiction to approve enrollment of any person after said date.

On September 25, 1906, relators procured from the Commissioner to the Five Civilized Tribes permission to reopen the case. A decision favorable to relators was then rendered by the Commission, and its decision was, on recommendation by the Commissioner of Indian Affairs, approved by the Secretary of the Interior, February 19, 1907. Notice of this approval was sent to the Commission, but was never communicated to the relators.

After the Secretary's affirmance of the Commission's decision had been sent to the Commission, the Secretary, on consideration of an opinion of Attorney General Bonaparte, the relators say, reached the conclusion that the decision of the Commission should not have been affirmed and so notified the Commission, which thereupon recommended that its favorable action be rescinded and the former decision adhered to. The Secretary of the Interior therefore recalled the action he had previously taken and reaffirmed the former adverse decision and the names of the relators were not put by the Commission to the Five Civilized Tribes on any of the rolls made by the Commission and did not appear upon any of the rolls made or approved by the Secretary of the Interior.

It appears that on February 19, 1907, Attorney General Bonaparte gave the opinion above referred to in Choctaw-Chickasaw cases, and it is contended by counsel for the relators, that this opinion had no bearing on the claims of Creek Indians as it construed only the Choctaw-Chickasaw agreement of 1902, creating the Choctaw-Chickasaw Citizenship Commission, which presented a different situation from that existing in Creek cases, and that the "sole and only" reason for the action of the Secretary of the Interior was the opinion of the Attorney General.

The petition contains the following allegation:

"That the practice and custom in enrolment matters in the Five Civilized Tribes was for the Commission to the Five Civilized Tribes where there was no contest of the right to enrolment of an applicant to place his or her name on a roll for approval and said roll then was transmitted and was stamped, approved and signed by the Secretary of the Interior or one of his Assistant Secretaries. Where a contest against the right to enrolment of the applicant was made no roll according to the uniform usage and practice was prepared by the Commission to the Five Civilized Tribes, but a decision was promulgated and said decision and the record in the case transmitted
21 to the Commissioner of Indian Affairs and thence to the Secretary of the Interior and the decision thereon of the Secretary treated as final and determinative of rights and the rolls thereafter prepared as a ministerial act by the Commissioner to the Five Civilized Tribes if the applicant was held entitled to enrolment and the roll stamped approved and signed by the Secretary of the Interior as a matter of course and of right upon presentation of the same. That in no case whatsoever prior at least to the fifteenth day of February, 1907, was a person, adjudged after a contest entitled to enrolment by the Secretary of the Interior, denied enrolment on an approved roll without notice and an opportunity to be heard."

The answer of the Secretary of the Interior sets forth the fact that the names of the relators were never placed upon an approved roll of citizens of the Creek Nation and were not upon any such roll approved by the Secretary at or prior to March 4, 1907. After reciting the various attempts of the relators to secure enrollment, the answer sets out that on February 19, 1907, the favorable recommendation of the Commissioner to the Indian tribes, concurred in by the Commissioner of Indian Affairs, was affirmed, and continues:

"That in pursuance thereof, said decision remaining unrevoked, respondent says that in due and regular course a roll bearing the name of the relators and such other Indians who appeared to possess the right of enrollment as citizens of the Creek Tribe or Nation of Indians and entitled as such to a share in the distribution of the tribal lands and funds would have been prepared and presented to the Secretary of the Interior for his final consideration and action by way of approval or disapproval; * * *"

"He further avers, however, that said decision of February 19, 1907, never became final and was never promulgated; * * *"

and that

"On March 4, 1907, the Secretary of the Interior rescinded the action of February 19, 1907, aforesaid, and in the exercise of his judgment and discretion, feeling and holding that the relators were not entitled to enrollment as Creek citizens under and by reason of the opinion of the Attorney General aforesaid, he reversed the Commissioner's decision of September 25, 1906, and affirmed that of the Commission of May 11, 1901."

The answer further alleges:

"* * * that the decision of the Commission or Commissioner to the Five Civilized Tribes therein referred to in cases where the

right *or* enrollment was contested, was merely tentative and advisory in its nature, designed to inform the Secretary of the Interior of the ultimate facts and the views of the Commission, or Commissioner, as to the right of enrollment of applicants in the case submitted, and to invoke authority from the Secretary to include the names of such applicants upon a roll later to be submitted for the Secretary's approval or disapproval; and he denies that the decision of the Secretary in such a case, affirming the views of the Commission, or Commissioner, was final and determinative of the right of the ap-
22 plicants, but that such decision merely afforded authority to said Commission or Commissioner to inscribe the names of such applicants upon a roll later to be submitted to the Secretary for his approval or disapproval;" and he denies that "* * * the decision of the Secretary in such a case, affirming the views of the Commission, or Commissioner, was final and determinative of the rights of the applicants, but that such decision merely afforded authority to said Commission or Commissioner to inscribe the name of such applicants upon a roll later to be submitted to the Secretary for his approval or disapproval.

The answer states further that it does not appear in the petition that the names of the relators were ever put on any roll prepared as aforesaid by the Commissioner, pursuant to the Secretary's action of February 19, 1907, but, on the contrary, that relators' names were not enrolled on any such roll; that the then Secretary failed to approve any roll containing their names as citizens of said tribe, and that the final action taken by the Secretary was and remains adverse to the claims of the relators; and that the Secretary of the Interior has been since March 4, 1907, without jurisdiction to enroll the relators as citizens, by reason of the provision of the act of April 26, 1906, (34 Stat. 137) quoted above.

In the petition and answer various acts of Congress are quoted and other facts alleged but the foregoing summary is sufficient to indicate the issues raised by the pleadings.

The principal contentions of the petitioners are that they were entitled to enrollment and that it was a plain mistake of law on the part of the Secretary to deny them this right, which mistake was due solely to a misconstruction of the opinion of Attorney General Bonaparte above referred to; that the Secretary's decision of February 19, 1907, "exhausted judgment and discretion and as to judgment or discretion is not open to review;" that what remained to be done thereafter was merely "ministerial * * * even less, purely clerical;" and that the Secretary having decided that the petitioners were entitled to enrollment and enrollment having been ordered he thereby awarded a right or privilege, the withdrawal of which without notice and an opportunity to be heard denied the petitioners due process of law.

The Secretary of the Interior contends on the other hand that the petitioners were not entitled to enrollment; that the question of their right was one involving the exercise of judgment and discretion and not subject to review, and that by the Act of 1906 all jurisdiction conferred on the Secretary of the Interior ceased on

March 4, 1907, up to which time the relators had not been on an approved roll of Creek Indians.

It is admitted in the memorandum of authorities submitted on behalf of the petitioners that the construction of the several acts of Congress referred to in the petition and answers called for the exercise of discretion and judgment on the part of the Dawes Commission and of the Secretary of the Interior, and that whether they decided rightly or wrongly in the first instance was a question not open to review except in the very plainest case of mistake of
23 law or fraud. They cite Roberts, Treasurer, vs. The United States, 176 U. S. 221, as an instance in which the Court controlled by a mandamus the action of the Secretary of the Treasury where the right of the relator was clear. In that case Congress directed the Treasurer of the United States to pay certain amounts to persons formerly holding certificates issued by a board of audit of the District of Columbia which had been redeemed by the Secretary. The petitioner had obtained a judgment in the Court of Claims for the amount due on his certificates and the Secretary having paid this judgment contended that he had not redeemed the certificates, there being nothing in his office to show anything beyond such payment, but the Court held that the payment was a redemption of the certificates and so deciding held further that there remained nothing to be performed by the Treasurer but a ministerial duty. Referring to United States vs. Black, 128 U. S. 40, which involved a claim to a pension, the Court says:

"The writ was refused in the Black case, because, as the Court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction and the effect which the latter acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus. The circumstances under which a party has the right to the writ are examined in the course of the opinion, which was delivered by Mr. Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

"In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within that meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

"This case comes within the exception stated in the Black case, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then man-

damus lies to compel its performance; but the court will not interfere with the executive officers of the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ."

In the United States vs. Black, 128 U. S. 40, the court said at page 43:

"The relator, by his counsel, strenuously contends that the
24 concession made by the Commissioner with regard to the disability of the relator shows that it was his clear duty to have granted a certificate for the larger pension of $72 per month. The following passage in the petition for mandamus shows the position taken by the relator:

'And your relator further says, that the respondent has thus expressly found the facts in your relator's case to be: (1) that while your relator was in the military service * * * he sustained such wounds and injuries as resulted in the loss of his right hand and right foot, and at the same time sustaining injury to the head; (2) that your relator was thereby rendered "totally and permanently helpless, requiring from thence till now the regular aid and attendance of another person;" and (3) that your relator applied to the Commissioner of Pensions on June 26, 1880, for pension on account thereof. And your relator says that upon this finding of the facts whether he is entitled to a rerating and an increase of pension from date of discharge, so as to give unto him a pension commensurate with his disabilities so found to exist by the respondent, is a question of law, and that it does not lie in the discretionary power of the respondent, as Commissioner of Pensions, to deny or in anywise abridge his rights with respect thereto.'

"This extract shows the theory of the petitioner and the doctrine which he invokes in support of his application. We have been more full in stating the facts of the case in order that the legal grounds on which that application is based may clearly appear."

Obviously the Court stated the admitted facts for the purpose of showing that apparently the relator there brought himself within the benefit of the statute. Applying the law to the case, the Court said at page 48:

"The principle of law deducible from these two cases is not difficult to announce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them.

"Judged by this rule the present case presents no difficulty. The Commissioner of Pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the

Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts."

One of the cases cited in United States vs. Black and fol-
25 lowed there was Decatur vs. Paulding, 14 Peters, 497, the facts in which were that Congress had passed a general pension law under the terms of which Mrs. Decatur, widow of Commodore Decatur, was entitled to a pension, and also a resolution granting her a special pension. Mrs. Decatur applied for and received her pension under the general act with the reservation of her rights under the special resolution, and then claimed besides the pension granted by the latter. The Secretary of the Navy decided that she could not have both and she sought to compel him by mandamus to comply with the special resolution. The Court quotes from the opinion in the Decatur case as follows:

"The duty required by the resolution was to be performed by him (the Secretary of the Navy) as the head of one of the executive departments of the government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General to assist him with his counsel; and it would be difficult to imagine why a legal adviser was provided by law for the heads of the departments, as well as for the president, unless their duties were regarded as executive, in which judgment and discretion were to be exercised."

In Kimberlin vs. The Commission to the Five Civilized Tribes, 104 Fed. Rep., 653 at 662, the Court says:

"Conceding, however, but not deciding, that the application of the plaintiff in error was in time to entitle her to a hearing and decision, that the facts which she alleged were admitted, and that it was the duty of the commission to hear and decide the question of her right to citizenship according to the law and the very right of the matter, the power and duty of the courts below and of this court are no less certain. It is conceded that the commissioners are executive officers. It is not their sole or chief function to hear and determine controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties who apply to them for membership in the Five Nations, they are vested with judicial powers by the acts of congress.

* * * This grant of power is plenary. It vests the authority and imposes the duty upon this commission to hear and to decide every question of law and of fact which is material to the right of

the applicant to enrollment as the citizen of a nation. Take the case at bar. The facts are conceded. But do these facts entitle the applicant to be enrolled as a citizen of the Chickasaw Nation? * * * The consideration and decision of these questions were indispensable to the determination of the plaintiff in error's right to the citizenship she sought, and the acts of congress intrusted
26 their consideration and decision to the judgment and discretion of the commission, and not to those of the courts. Under these acts of congress the commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refusal to enroll the applicant in each particular case constitutes its judgment in that cause. In the case before us this tribunal was heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the judicial discretion of the commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled rules to which attention was called in the opening of this opinion, no court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision."

These cases are convincing to the effect that if the decision of the Secretary had been adverse to these petitioners in the first instance there would have been no power in this court to review that decision, and if it could not review the decision obviously it could not consider whether it was made on a mistaken view of the scope of the opinion of the Attorney General.

If this be so the Court cannot now consider the fact assuming it to be a fact that the Secretary changed his mind as to the petitioners' rights on a mistaken view of that opinion.

It would be difficult if not impossible to lay down a general rule applicable to all cases fixing a point of time when what remains to be done in the course of executive or administrative action becomes purely ministerial; that is to say, when the time for deliberation has passed. The following quotations from Marbury vs. Madison, 1 Cranch, 137, 157, 162, are illustrative.

"The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction."

* * * * * * *

"Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed."

27 See also United States vs. Schurz, 102 U. S. 378, 402, where the Court says:

"From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land-officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title-deeds destroys his title."

The case was one of a claim to public lands and a patent had been actually signed and sealed and recorded in the land records and forwarded to the commissioner of the local land office with instructions to deliver it to the relator but delivery was refused because instructions had been given by the Interior Department to return the patent.

In Butterworth vs. Hoe, 112 U. S. 50, 68, the Court says:

"Some question is made as to the remedy. We think, however, that mandamus will lie, and that it was properly directed to the Commissioner of Patents. He had fully exercised his judgment and discretion when he decided that the relators were entitled to a patent. The duty to prepare it, to lay it before the Secretary for his signature, and to countersign it, were all that remained, and they were all purely ministerial. These duties he had failed and refused to perform merely out of deference to the claim of the Secretary to reverse and set aside the decision on the merits in favor of the relators. This we have not held to be a valid excuse."

The case at bar is not within the authority of any of these cases, as is apparent from the statutes relied upon here, which provide in terms that only those whose names are on rolls approved by the Secretary of the Interior are entitled to allotments and from the decision in Lowe vs. Fisher, 233 U. S. 95, that it was the congressional policy of the allotment of lands to Indians to retain in the Secretary of the Interior the power of revision and correction until the final moment when jurisdiction was expressly taken away from him as provided in section 2 of the Act of April 26, 1906 (34 Stat. 137, chap. 1876); namely, the 4th day of March, 1907. The facts

in Lowe vs. Fisher were that rolls were made up and certificates of allotment actually issued to the enrolled Indians, but their names were stricken from the rolls after notice of the intended action and an opportunity to be heard. The Court says at page 107:

"In all the legislation providing for the making of the rolls care is observed to prevent or correct mistakes and to defeat at-
28 tempts at fraud. We have seen what power the Dawes Commission was given to investigate the rights of persons whose names were on the rolls, and, as to freedmen, strict compliance with the decree of the Court of Claims was enjoined. By the act of March 3, 1905, 33 Stat. 1048, 1060, c. 1479, the work of completing the unfinished business of the Commission was devolved upon the Secretary of the Interior and all of the powers theretofore granted to the Commission were conferred upon the Secretary. It was subsequent to this act that action was taken as to relators and their names stricken from the rolls. This revisory and corrective power of the Secretary over the allotment of land is similar to that exercised by the Land Department respecting the entries upon public lands, which this court has stated to be correct and annul entries of land which were made upon false testimony and without authority of law."

The remaining contention of the petitioners is based on their allegation that the applicable statutes, rules regulations and practice provided for notice and an opportunity to be heard at every stage of procedure, including therein the right within a certain time to file a motion for a rehearing or review of the decision of the Secretary of the Interior. This allegation does not seem to be specifically denied in the answer, but it is claimed that the favorable decision of the Secretary, not communicated to the petitioners and not resulting in the placing of their names on any roll tentative or otherwise, did not establish rights which could not be taken from them without notice and an opportunity to be heard.

In Garfield vs. Goldsby, 211 U. S. 249, it appeared that the Secretary of the Interior on March 4, 1907, without notice, struck from the rolls the name of the relator. It was held that the statutes did not confer the power and authority to do so, and that the status of the relator should be restored. The relator held an allotment certificate which the statute provided should be "conclusive evidence of the right of any allottee to the land described therein." The Court says at page 262:

"The acts of Congress, as we have seen, have made provision that the commission shall certify from time to time to the Secretary of the Interior the lists upon which the names of persons found by the commission to be entitled to enrollment shall be placed. Upon the approval of the Secretary of the Interior these lists constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and Chickasaw freedmen, upon which allotments of lands and distribution of tribal property shall be made.

"The statute provides in Sec. 30, act of July 1, 1902, supra:

'Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the In-

terior lists cm' racing names of all those lawfully entitled to enrollment the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the Governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.'

"The Secretary took the action contemplated by this section and acted upon the list forwarded by the commission. The roll was made up and distributed in quintuplicate, as required by the statute. Notice was given to the commission, and land was allotted to the relator, as provided by Sec. 23 of the Act of July 1, 1902, supra. The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired."

In Lowe vs. Fisher (supra) it was held that the status held in the Goldsby case to exist may be changed after notice and an opportunity to be heard. The question here presented was not involved in those cases. It should be remembered that the entire administration of the act was in the hands of the Secretary when the relators' case was decided. It was not before the Secretary as on an appeal from the Commission. The latter when informed of a favorable decision placed the name of the applicant on a list on which the Secretary later noted his approval. It is claimed that this notation was a perfunctory act, a mere certificate of authenticity and not an approval prescribed by the Statute. The Secretary says that the notation was the final act prescribed and that it was done in the exercise of judgment and discretion. While the contention of the relators might be sound in case of a favorable and unrevoked decision, which point is not here decided but is mentioned because urged argumentatively, the actual situation was in substance that the Secretary notified a subordinate that he had reached a conclusion favorable to the relators and instructed him to present a paper on which he (the Secretary) was required by law to express his conclusion in order that it might be of any benefit to the relators, but reached a different conclusion and countermanded his instructions before the paper was even prepared. The Court cannot find any ground for the conclusion that the action of the Secretary was not rightly taken without notice to the relators.

Even though it were conceded that except for such termination of the jurisdiction of the Secretary the petitioners would have had a right to apply for a rehearing, not having done so prior to March 4, 1907, such right clearly ended at that time for the reason that it was within the power of Congress to deprive the Secretary of all jurisdiction as of that date. Stephens vs. Cherokee Nation, 174 U. S. 478.

The demurrer is overruled.

Give notice of settlement of order.

By the Court: WALTER I. McCOY,

Justice.

30 *Order Overruling Demurrer.*

Filed February 29, 1916.

* * * * * * *

This cause came on to be heard on the petition, the rule to show cause issued, the return and answer of the respondent, the relators' demurrer thereto, and was argued and submitted by counsel. Whereupon the same having been fully considered by the court, it is this 29th day of February, 1916.

Ordered, That the relators' demurrer to respondent's answer and return be, and the same is hereby, overruled, with leave to relator to file forthwith a replication to said answer and return if so advised, and with reasonable costs to the respondent to be taxed by the clerk upon the final disposition of the cause.

By the Court:

WALTER I. McCOY,
Justice.

Joinder of Issue.

Filed February 29, 1916.

* * * * * * *

Now come the petitioners in the above entitled cause and join issue on the Return to the Rule to Show Cause and Supplement thereto filed by the respondent.

CHAS. H. MERILLAT,
W. C. FRANKLIN,
Attorneys for Petitioners.

Memorandum.

February 29, 1916.—Cause referred to Examiner to take testimony.

Opinion.

Filed October 22, 1917.

* * * * * * *

This is a petition for a writ of mandamus to require Franklin K. Lane as Secretary of the Interior to place the names of the petitioners or cause the same to be placed on the approved rolls of the members or citizens by blood of the Creek Nation, and to accord to the petitioners the status and rights belonging to blood members on the approved rolls of the Creek Nation of Indians. An amended petition was filed and the Secretary filed an answer and amended

answer to which the petitioners demurred. The demurrer
31 was overruled and the matter is again before the Court after the taking of testimony.

The material allegations of the answer and amended answer are supported by the evidence and upon the hearing the only additional authority cited by the petitioners was the United States v. Wildcat, et al., decided by the Supreme Court of the United States on May 21, 1917, which case however does not sustain the contention of the petitioners.

The writ must therefore be refused.

Settle decree on two days' notice.

By the Court:

WALTER I. McCOY,
Justice.

Judgment Denying Mandamus.

Filed October 26, 1917.

* * * * * * *

This case came on further to be heard at this term; and thereupon, upon consideration thereof, it is, this 26th day of October, 1917,

Ordered and adjudged, that the rule to show cause herein issued be, and the same is, hereby, discharged, that the relators' petition for the writ of mandamus be, and the same is, hereby, dismissed, and that respondent recover his reasonable costs to be taxed by the clerk and have execution therefor.

By the Court:

WALTER I. McCOY,
Justice.

From the aforegoing judgment, the relators on the 26th day of October, 1917, prayed an appeal in open court to the Court of Appeals for the District of Columbia, and the same is hereby allowed; whereupon the penalty of a bond for costs on appeal is hereby fixed in the sum of $100, with leave to the relator- to deposit the sum of $50, with the clerk of the court in lieu of said bond.

By the Court:

WALTER I. McCOY,
Justice.

The petitioners by their counsel in open court noted an exception to the finding of the court that the rules, regulations and practice of the Interior Department did not provide for hearing or opportunity to be heard before a decision in their favor could be revoked and cancelled.

Also an exception to the finding of the court that petitioners were not entitled to a hearing or opportunity to be heard before the decision of the Secretary of the Interior in their favor could be revoked and cancelled.

Also an exception to the failure of the court to find that after a decision of the Secretary of the Interior in their favor the
32 signing and approval of the rolls were mere ministerial acts in the absence of a reopening of the cause by appropriate proceedings and hearing or opportunity to be heard thereon;

And asked that the same be noted on the minutes of the court and the same by the court were allowed and ordered noted on the minutes of the court now for then this 26th day of October A. D. 1917.

WALTER I. McCOY,
Justice.

Memoranda.

November 1, 1917.—$50. deposited in lieu of appeal bond.

November 27, 1917.—Time to settle Bill of Exceptions and file Transcript of Record extended to December 28, 1917.

December 18, 1917.—Time to submit Bill of Exceptions and file Transcript of Record extended to February 1, 1918.

January 25, 1918.—Bill of Exceptions submitted.

January 29, 1918.—Time to file Transcript of Record extended to and including February 15, 1918.

Supreme Court of the District of Columbia.

Wednesday, January 30th, 1918.

Session resumed pursuant to adjournment, Hon. William Hitz Justice presiding.

Before Judge McCoy.

* * * * * * *

The Court having this day signed the Bill of Exceptions, heretofore submitted, as of the time of the noting thereof at the trial, now hereby orders the same of record nunc pro tunc.

Assignments of Error.

Filed February 2, 1918.

* * * * * * *

The trial court erred:

1. In dismissing the petition and entering judgment in favor of the defendant.

2. In not giving judgment with costs in favor of petitioners and in not directing that the writ of mandamus issue compelling the defendant to enroll petitioners as blood members of the Creek Nation and also compelling defendant to recognize petitioners as entitled to their respective shares in Creek tribal lands and funds.

3. In finding that petitioners were not entitled to a hearing before the decision of the Secretary of the Interior in their favor
33 as entitled to enrolment as blood members of the Creek Nation could be revoked and cancelled.

4. In not finding that the decision of the Secretary of the Interior of February 18, 1907, holding petitioners entitled to enrolment as blood members of the Creek Nation gave or conferred on them rights and privileges of which they could be deprived only after hearing or opportunity to be heard.

5. In not finding that the decision of the Secretary of the Interior of February 18, 1907, was an adjudication of rights and left remaining only the ministerial duty of enrolment, and to compel which mandamus should issue.

6. In not finding that on the facts established by the record petitioners are entitled to enrolment and that the decision of the Secretary of the Interior holding them entitled was correct under the law and the conceded facts and that the action later taken by the Secretary in not preparing and signing a roll containing their names was arbitrary and unlawful and erroneous.

7. In not finding that under the rules, regulations and practice governing enrolment matters there was no lawful right to revoke the decision of the Secretary in favor of petitioners except after giving them an opportunity to be heard.

CHAS. H. MERILLAT,
Attorney for Petitioners.

Designation of Record.

Filed February 2, 1918.

* * * * * * *

In preparing the transcript of record on appeal in the above case the Clerk will please embody the following:

1. Petition and Amendment, including memo. of leave to file amendment.
2. Answer to Petition.
3. Stipulation amending answer.
4. Demurrer.
5. Opinion of Justice McCoy.
6. Order Overruling Demurrer.
7. Joinder of Issue.
8. Memo. of Reference to Examiner.
9. Judgment and Appeal.
10. Memo. of deposit on appeal.
11. Memo. of time extensions to settle bill and file transcript.
12. Bill of Exceptions (to be furnished by counsel).
13. Assignment of errors.
14. This designation.

CHAS. H. MERILLAT,
Attorney for Petitioners.

34 UNITED STATES OF AMERICA,
District of Columbia, ss:

Supreme Court of the District of Columbia.

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 52, both inclusive, to be a true and correct transcript of the record, according to directions of counsel, herein filed, copy of which is made part of this transcript, in cause No. 58265 at Law, wherein The United States of America, ex Rel., Jennie Johnson, et al., are Petitioners and Franklin K. Lane, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 15th day of February, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Supreme Court of the District of Columbia.

At Law. No. 58265.

THE UNITED STATES ex Rel. JENNIE JOHNSON et al.

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial on the 14th day of September, 1917, before Mr. Justice McCoy sitting without a jury, Mr. Charles H. Merillat appearing on behalf of the petitioners, and Mr. C. Edward Wright appearing on behalf of the respondent, the testimony previously having been duly taken before examiners and stenographically reported.

And thereupon the petitioners to maintain the issues upon their part joined, gave evidence by the following witnesses, tending to prove as follows:

WILLIAM R. HARR testified that he was a lawyer, and formerly was an attorney in the Department of Justice. As such, he had prepared the opinion of the Attorney General of February 19, 1907 (24 Opin. A. G., 127), in the Randolph, West, and other cases, the Attorney General revising the opinion to some extent.

35 In that opinion he had not undertaken to pass upon Creek enrolments, the opinion dealing merely with the matter of Choctaw and Cherokee enrolments.

Prior to March 4, 1907, he was not aware that under his opinion the Secretary of the Interior had acted adversely with respect to a large number of persons previously held entitled to enrolment.

No hearing had been given to Jennie Johnson or any other relators or any other persons connected with the Creek tribe in connection with the rendition of the opinion of February 19, 1907.

YVON PIKE testified that he was now in the General Land Office and had been in the Interior Department since 1880. He was Assistant Chief of the Indian Territory Division in the Interior Department prior to March 5, 1907, and was engaged in adjudicating enrolment cases and in the settlement of the estates of the Five Civilized Tribes. The Chief, Luther R. Smith, was dead, as was Secretary Hitchcock.

The clerks in the division prepared the decisions and presented them to Judge Smith without passing through witness' hands. If the telegram dated February 23, 1907, addressed to Bixby, Commissioner, and signed by E. A. Hitchcock, bore only his initials in the upper right hand corner, then witness had prepared it, but he did not recall that he prepared it, the initials would tell.

No hearing had been given Jennie Johnson or any other applicant for enrolment before the telegram was sent to the Dawes Commission directing cancellation of enrolment, or prior to the action of March 4, 1907. There was never any law, rule or regulation requiring it.

Enrolments were made by the Commission to the Five Civilized Tribes, which prepared rolls and submitted them to the Department for approval, taking the tribal rolls as a guide. Prior to preparing rolls, they submitted certain contested or doubtful cases for decision, and it was these cases that were passed on in the Department. The Commissioner of Indian Affairs first would make a written report, to the Secretary of these cases coming up from the Commission to the Five Tribes.

Letters were prepared in the Indian Territory division of the Secretary's office, for the Secretary's signature directed to the Dawes Commission. These letters were press copied and placed among the official public records as soon as signed and were accessible to any person having property interests in the records.

The paper the Secretary signed directed to the Dawes Commission embodied the conclusion or decision he had reached with respect to the enrolment rights of the individual, and these decisions of the Secretary were transmitted in due and regular course of procedure with directions embodied in the letter of transmittal. This record was open to inspection.

It was possible that in Washington, where there were local attorneys, they were notified as matter of courtesy, but the Dawes Commission, as he recalled, was not directed to notify anybody,

36 though they probably did. There were never any rules of practice about it and the law did not specify that any notice should be given.

The Dawes Commission rendered its finding in the shape of a judgment submitting the case with recommendations in regard to it. They did not notify the party of the decision. The Commissioner of Indian Affairs never rendered any decision, after taking testimony. He did not now remember whether the records showed the applicants, through attorneys frequently adduced testimony by witnesses. He had no doubt hearings were given.

Certainly, it was recognized that property rights were involved in the citizenship applications.

He did not recall any case in which prior to February 19, 1907, where the Secretary had rendered a decision holding a person entitled to enrolment, that the parties named were not put upon a roll, which roll was then signed and approved by the Secretary.

A decision signed by the Secretary and placed in the public files was not treated or regarded as merely experimental. It was considered final unless some request by the Dawes Commission or Commissioner of Indian Affairs was made in regard to it, and as a judgment in respect to the merits of the case. The name went on the rolls unless after a decision, the Dawes Commission objected, or other cause for suspension arose.

The usual procedure was to prepare a roll, following the decision being signed, and to make everything ready so all the Secretary had to do was to affix his signature to the place made for his approval.

Counsel thereupon offered in evidence a copy, identified by the witness, of an opinion of Assistant Attorney General Campbell, approved by Secretary Hitchcock, dated January 31, 1905.

Department of the Interior, J. R. W.
Office of the Assistant Attorney General, S. V. P.
Washington. W. C. P.

I. T. D.
452-1902.
12252-1904.

January 31, 1905.

The Secretary of the Interior:

SIR: I received by reference of December 6, 1904, with request for opinion thereon, the papers in the case of R. F. Barber, applicant for enrolment as a citizen of the Creek Nation.

The case is presented upon a motion to reopen the decision of the Commission to the Five Civilized Tribes affirmed by the Department January 24, 1902, denying his application. The record shows that May 18, 1901, Barber appeared before the Commission and applied for enrolment, and January 4, 1902, the Commission found that Barber was borne upon the authenticated 1890 roll of Broken Arrow town by the name of R. F. Bailer, but was stricken therefrom in 1895 by the Citizenship Committee under the act of

June 10, 1896 (29 Stat., 321, 339), and was denied enrolment, which was upon appeal affirmed by the United States Court
37 for Indian Territory, January 4, 1902, the present commission held that he was not a citizen of the Creek Nation and that by the act of May 31, 1909 (31 Stat., 221, 236), it was without authority to receive or consider his application.

November 10, 1904, counsel for Barber served upon the attorney of the Nation and filed with the Commission the present motion, and brief thereon, which alleges error of the Commission in refusing to hear testimony of witnesses adduced by him May 18, 1901, and asserts that if permitted he could have shown that he was duly borne on the tribal roll of 1896, and that the Commission in 1896 was without authority to deny his enrolment; that if permitted he could have shown that the citizenship committee which attempted to strike names of Creek citizens from the 1895 roll had no authority so to do, and in fact did not do so.

No response is made by the attorney for the nation to the motion and brief so filed and served upon him. I therefore, for the purposes of the case as here presented, assume that it is a conceded fact that applicant's name appeared upon the roll in 1896, that he was not stricken from the roll by the citizenship committee in 1895, and that the commission fell into an error of fact, January 4, 1902, in so finding.

If in fact the applicant was borne upon the rolls of the Creek Nation neither the Commission in 1896, nor the court had authority to deny his enrolment and their action in so doing was a void act. The tribal rolls were confirmed and no authority existed to eliminate names therefrom. If he was in fact upon the rolls and had not been eliminated therefrom by the citizenship committee, he was entitled to be heard by the present commission upon the merits of his case and to show his right to be enrolled. I am therefore of opinion, upon the facts as presented, that the motion should be sustained and the case reopened.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved January 31, 1905.
E. A. HITCHCOCK,
Secretary.

Department of the Interior,

Washington.

D. C. 6427-1905.
I. T. D. 452-1902.
12252-1904.
1126-1905.
L. R. S.

February 3, 1905.

Commission to the Five Civilized Tribes, Muskogee, Indian Territory:

GENTLEMEN: Departmental letter of January 24, 1902, affirming your decision rejecting the application of R. F. Barber for en-
38 rolment as a citzen of the Creek Nation, is hereby rescinded, and the case reopened, in accordance with the opinion of the Assistant Attorney General of January 31, 1905, approved by the Department, upon a motion to reopen the matter, in order that the applicant may be heard upon the merits of his case.

A copy of said opinion, the motion to reopen, and the testimony received with your letter of January 13, 1902, are enclosed.

Respectfully,

(Signed) THOS. RYAN,
Acting Secretary.

Between February 19, 1907, and the closing of the rolls, there was a vast rush of work and an almost impossible task. No hearings were had before the office. They did not have any hearings before the office enrolment matters. There was one case in that time that he recalled that was sent to the Assistant Attorney General's office. Mr. Howell adjudicated that case and could tell whether hearings were given to it. It was probably true that because of this rush of work copies of what was done in the Secretary's office in the last two weeks were not transmitted until after March 4, 1907. The Secretary never did handle any individual cases himself. He accepted the letters prepared by the division. He never himself gave the cases consideration and does not even in land cases.

On cross-examination, witness testified that the public had access to letters in his office files concerning enrolments precisely as they would to any other matter of departmental action. Cases were sent up on testimony by the Dawes Commission and with the Commission's recommendation. It was not a matter of appeal. Parties had no right to be heard before the Department and there were no hearings that he could recall. Parties had hearings before the Commission and attorneys appeared. They never received notices of decisions except as the Commission may have seen fit to give. There were no regulations about it. Decisions dealt with the persons named in the decisions and there were specific rulings as to each person by the Commission. The Secretary affirmed or rejected it as the case might be.

On cross-examination, over objection that it called for a mere

conclusion, witness testified it was his understanding that decisions of the Dawes Commission when affirmed by the Secretary were not final in the sense that the Secretary could not rescind them. He considered the approval of the roll as the equivalent to the issue of a patent in land cases, where the decision could be recalled at any time before patent issued. The rolls presented for the Secretary's approval contained the names of parties, tribal membership, sex, age and quantum of blood. Such details were not determined in any of the letters of the Secretary authorizing enrolment. On redirect examination, witness said it was correct that they followed the land practice where decisions could be recalled at any time before patent. Asked if he had any knowledge of any land practice whereby after the Secretary had rendered a decision, directing the preparation and signing of a patent and the decision had been placed in the public files and patent directed to issue, the party's rights had been taken away and the decision revoked without an opportunity to be heard, witness testified that he knew of cases where decisions had been recalled and other or further hearings had if wanted, or upon the old testimony, and adverse decisions rendered thereafter. He did not know whether this was without giving the party any notice or opportunity to be heard; the records would show as to that.

39

Where the Dawes Commission had no doubt and the parties were on rolls, they put them on the rolls and did not submit the cases at all. In the great mass of cases of enrollment, probably 90 per cent, all that came up from the Commission to the Five Civilized Tribes, were rolls ready for signature. In the other cases, where the Commission had doubts the record would be sent up. When thus sent up, the effect of the Secretary's decision was a direction to the Dawes Commission as to what to do in those cases. He did not know whether there was ever any land case in which, after the local land office had rendered a decision holding a party entitled, that thereafter without notice and opportunity to be heard a party's rights had been taken away.

There was introduced in evidence the following official records in the matter of the decisions with reference to the enrollment of petitioners:

Cr. En. 1027.

Department of the Interior,

Commissioner to the Five Civilized Tribes.

in the Matter of the Application for the Enrollment of Jennie Johnson and Her Children, Clarence Johnson (Deceased), Fanny Johnson, Jennie Belle Johnson, Walter Johnson, and John B. Johnson, as Citizens of the Creek Nation.

Decision.

The record in this case shows that on July 30, 1900, Jennie Johnson appeared before the Commission to the Five Civilized Tribes, at

Muskogee, Indian Territory, and made application for the enrolment of herself and her three minor children, Mary F., Jennie B., and Walter A. Johnson as citizens of the Creek Nation; that on April 26, 1901, she again appeared before said Commission and offered additional testimony in support of her said application, including therein the names of her four minor children, Clarence, Fanny, Jennie Belle and Walter Johnson; that under date of May 11, 1901, decision was rendered by said Commission denying said application, which said decision was affirmed by the Department on January 29, 1902; that on April 11, 1906, upon motion of said Jennie Johnson through her attorneys, said case was reopened by the Department, and that a further hearing was had on May 18, 1906, at which time said Jennie Johnson appeared and further testified in
40 the matter of said application, including therein the name of her minor child, John B. Johnson.

Affidavits in the matter of the death of Clarence Johnson and the birth of Jennie Belle Johnson and John B. Johnson, filed with this office September 18, 1906, are attached to and made part of the record herein.

The evidence shows that said Jennie Johnson, the principal applicant, was born in the State of Texas and removed to the Creek Nation in the year 1886, where she has since resided; that the other applicants herein were born in Indian Territory and with the exception of Clarence Johnson are now residents of the Creek Nation; that Clarence Johnson was born in the year 1885 and died February 19, 1900; that Jennie Belle Johnson was born November 28, 1902; Walter Johnson was born September 29, 1894, and that John B. Johnson was born June 3, 1904.

It appears from the evidence and from the records in the possession of this office that the names of Jennie Johnson, Cleran Johnson and Fanny Johnson are found upon the 1890 authenticated Creek roll; that said names are not among those listed on the 1895 authenticated Creek roll; that in the year 1895 said names were stricken from the rolls by the Committee of Eighteen; that at a subsequent date application was made to the Colbert Citizenship Commission for the reinstatement of said applicant and her children as citizens of the Creek Nation and no action was taken thereon by said Citizenship Commission; that application was made to the Commission to the Five Civilized Tribes in the year 1896 for the enrolment of said Jennie Johnson and her minor children as citizens of the Creek Nation, in accordance with the provision of the Act of Congress approved June 10, 1896 (29 Stat. 321); that said application was denied by said Commission; that an appeal was taken from said decision to the United States Court for the Northern District of Indian Territory, and that said judgment of the Commission was affirmed by said Court.

The Assistant Attorney General for the Department in an approved opinion under date of January 31, 1905, in the Creek citizenship case of R. F. Barber (a case analogous in all material respects to that of Jennie Johnson, et al. held that:

"If in fact that applicant was borne on the rolls of the Creek

Nation, neither the Commission in 1896, nor the Court, had authority to deny his enrolment and their action in so doing was a void act."

In the Creek citizenship case of Frank London et al. it was held by the Department that

"If the applicants are otherwise entitled to be enrolled as citizens of the Creek Nation, the striking of their names from the 1895 roll by the Committee of Eighteen does not affect their rights."

It is therefore the opinion of the Commissioner that in view of the opinion of the Assistant Attorney General and the ruling of the Department, above cited, said Jennie Johnson and her children, 41 Clarence Johnson (deceased), Fanny Johnson, Jennie Belle Johnson, Walter Johnson and John B. Johnson are entitled to be enrolled as citizens of the Creek Nation, in accordance with the provisions of the acts of Congress approved June 28, 1898 (30 Stat., 495), March 1, 1901 (31 Stat., 861) and April 26, 1906 (Public No. 129), and the application for their enrolment as such is accordingly granted.

TAMS BIXBY,
Commissioner.

Muskogee, Indian Territory.

Department of the Interior,

Office of Indian Affairs.

Land.
85000-1906

Washington, February 15, 1907.

The Honorable the Secretary of the Interior.

SIR: Referring to Department letter of April 11, 1906 (I. T. D. 5844) there is enclosed a report from the Commissioner to the Five Civilized Tribes transmitting the record relative to the application for enrolment of Jennie Johnson and her children, Clarence Johnson (deceased), Fanny Johnson, Jennie Belle Johnson, Walter Johnson and John B. Johnson as citizens of the Creek Nation. The Commissioner held that the applicants were entitled to enrolment.

The evidence shows that Jennie Johnson, the principal applicant was born in the State of Texas and removed to the Creek Nation in the year 1886, where she has since resided, and that the other applicants were born in the Creek Nation.

The record shows that the names of Jennie Johnson, Cleran Johnson and Fannie Johnson are found on the 1890 authenticated Creek roll, but that their names are not on the 1895 authenticated Creek roll, and that in the year 1895 these names were stricken from the roll by the Committee of Eighteen.

The Assistant Attorney General for the Department in an approved opinion under date of January 31, 1905, in the Creek citizenship case of B. F. Barber (a case analogous in all material respects to that of Jennie Johnson et al.) held that:

"If in fact the applicant was borne on the rolls of the Creek Na-

tion, neither the Commissioner in 1896, nor the Court has authority to deny his enrolment and their action in so doing was a void act."

In the Creek citizenship case of Frank London et al. it was held by the Department on April 15, 1905 (I. T. D. 3194-1905):

"If the applicants are otherwise entitled to be enrolled as citizens of the Creek Nation, the striking of their names from the 1895 roll by the Committee of Eighteen does not affect their rights."

It is therefore recommended that under these holdings the decision of the Commissioner favorable to the applicants be approved.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

42 J. P. B.—N. L.
Direct.

February 18, 1907.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: September 25, 1906, you resubmitted the record in the matter of the application of Jennie Johnson for the enrolment of herself and her four minor children, Clarence, Fanny, Jennie Belle and Walter Johnson, as citizens of the Creek Nation, together with your decision holding that the applicants are entitled to enrolment.

Reporting February 15, 1907 (Land 85000-06), the Indian Office recommends that your decision be approved. A copy of its letter is inclosed.

Your decision is hereby affirmed. The papers in the case and a carbon copy hereof have been sent to the Indian Office.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

1 inc. and 2 for Ind. Of.

JOSEPH W. HOWELL testified that he was now employed in the Indian Office, and that he was employed in the Indian Territory Division, Secretary's office, from some time in May, 1902, to the latter part of 1905, or early part of 1906, and in 1906 and 1907, in the office of the Assistant Attorney General for the Interior Department, on enrollment matters. While in the Indian Territory Division a considerable portion of his time was engaged in examining records, and preparing decisions in enrolment cases. In the Sereno Bullock case he had prepared a decision or opinion which was signed by the Secretary.

The procedure of enrolment was for applications to be presented to the Dawes Commission at Muskogee. This Commission made investigations, took testimony, and consulted tribal records and rendered a decision. This decision was transmitted to the Indian Office, which office made a report with a recommendation to the Secretary. The Indian Territory Division prepared decisions for the signature of the Secretary. He was now referring to enrol-

ments involving controverted matters or difficult questions, which constituted perhaps 10 per cent of the cases. Frequently references of cases were made to the Assistant Attorney General for an opinion.

The decision of the Secretary took the form of a letter giving the names of the parties, and statements of facts, and, sometimes, of the law "and finally ruling to the effect that the persons were or were not entitled to enrolment, and the decision always containing instructions that were in accord with its tenor." It took the form of a letter purporting to decide the case, and if the party was held entitled to enrolment, directed his name to be placed upon a schedule or roll to be signed by the Secretary. A great many de-
43 cisions during the first part of the work were not final. They were orders remanding cases and a great many did not pass upon rights but directed rehearings. Other decisions recalled them and found they were not entitled; and other decisions found they were entitled.

The records coming from the Dawes Commission showed the time and place of hearing, and a notation of appearances of attorneys. In a great many cases, the applicant came before the Commission without an attorney. In other cases attorneys were present and it would be the uniform practice for the tribal attorneys to be present. The general form was appropriate for a legal hearing where there were parties to a controversy. The testimony was transmitted in typewriting, very similar as on a hearing before a master in chancery. The parties were sworn, and we received a great many letters and papers purporting to be briefs. The general practice was to have proceedings in the usual manner with an opportunity to the Indian nations to hear and defend against the rights of applicants. The Dawes Commission rendered a decision which was in the form of a decision or judgment for or against the person. He did not recall the precise language, but it was not a recommendation, but rather in the form of a judicial decree.

After the Dawes Commission had rendered its decision, this decision, with the record, was forwarded as matter of course to the Indian Office. The Indian Office was regarded as a medium of transmission. The Indian Office report took the form of a recommendation that the decision be approved or affirmed. The records did not contain any new testimony introduced after the case came to the Indian office, but there were some cases where briefs were filed, he thought; but he could not say with any degree of certainty that the briefs had been filed in the Indian Office by the applicant.

"My recollection is that the Dawes Commission records showed a carbon copy of a letter sent to the applicant or his attorney or to the tribal attorney transmitting a copy of the Dawes Commission decision, and notifying them that the matter would be forwarded to the Secretary." He had seen cases where they were notified that it would be done within a certain number of days. Notice was given or that decision would be sent to the party in interest.

Opportunity was afforded for rehearings, or review before the decision of the Dawes Commission was forwarded to Washington.

This opportunity also was afforded at any time at any of the offices.

The action of the Indian Office was in the form of a letter of recommendation and not a decision. Whether the Commissioner gave out his letters to the Secretary the witness did not know.

In the Indian Territory Division, decisions sometimes would be rendered of an interlocutory nature, authorizing rehearings. Both applicants and the tribe were afforded every reasonable facility to establish their cases.

Assuming there had been appearances, it was the general
44 rule not to consider any paper unless service was made upon the opposite party. It was more of a practice or usage that grew up rather than any positive rule or regulations. Notice was given when it reasonably could be given.

He could not recall any particular case in which there had been any denial of opportunity to be heard.

Letters were prepared in forms employed in legal decisions, and after being signed were press copied, and the originals sent to the Dawes Commission. Attorneys and applicants were allowed to see these decisions always when they asked for them.

He knew that in some instances copies of the Secretary's decision were forwarded to representatives of the parties, but whether there was a general practice with regard to giving notice to the parties he did not recall. He knew that in some very important cases motions for review were filed after the Secretary's decision, in writing.

The general form of the Secretary's decision was that a party is entitled to enrolment, and directed the Dawes Commission to enroll him as a citizen of the nation. No person was allowed to share in lands or money unless finally enrolled.

In the great mass of cases all that came up were schedules containing names of parties—he has no reason to question Mr. Pike's statement that this was true as to 90 per cent of the names on the rolls.

He could recall no specific case in which prior to February 19, 1907, where after the Secretary in a formally signed letter, had adjudicated the party entitled to enrolment and had directed preparation of a roll containing the parties' names, to be signed by the Secretary, in which the party was not thereafter enrolled and afforded an opportunity to be heard; that he was not in the Indian Division for a year previous to the closing of the rolls.

The Secretary's decision was final in its terms. It was always regarded up to March 5, 1907, as subject to reopening on a motion for review.

Q. Was it regarded as being open to a motion for review without the party thus entitled having an opportunity to defend himself?

A. I think I have stated the general practice in regard to that. It was not intended to take anybody by surprise or anything of that kind, but those decisions were always regarded as open to challenge as long as the jurisdiction of the Secretary continued in regard to

enrolment matters. That is to say, that if the Cherokee Nation, for example, was not satisfied with a decision it might file a motion for reconsideration at any time while the enrolment work was in progress.

Q. Was not that true even after the roll was signed and approved and before March 4th, 1907, that a motion, or other appropriate proceeding, could be had to reopen the matter of the approval of the roll itself?

A. Any decision, for or against, an applicant could always be reconsidered up to March 5th, 1907.

Q. Could the matter be reopened even though the actual act had been completed of stamping a roll and signing it approved?

A. It could be.

Q. Was there any difference in that regard between the decision directing the enrolment and the fact that the roll had been actually approved in practice?

A. The practice was this, whatever was done having for its purpose to change something that had been done must necessarily be performed according to the practice which was to file a motion for review or reconsideration served upon the other party. That was the general practice.

Q. That was true, was it not, both with respect to these decisions and also with respect to the fact that the roll showed it had been actually approved?

A. Yes, sir, the mere approval of the schedule did not preclude re-examination of the matter. Any decision could be taken up and reconsidered up to the time that the jurisdiction of the Secretary expired by operation of law.

Over the objection of the defendant that it is immaterial as to how the witness regarded the legal effect, calling for a conclusion of law, pure and simple, witness was asked:

Q. Which, as your experience goes, was regarded as the decision of the party's rights, the signing of a formal order directing enrolment or an actual approval of a paper containing the names?

and answered:

A. Now, as you go back into my memory about that I hardly know what to say as to what was supposed to be the fact. It was understood that when a decision was rendered that it would be put into force.

Q. Was the decision regarded merely as an advisory act or as otherwise?

A. I have said all decisions and all action were open to challenge up to the end of the enrolment period if the matter was properly presented.

Q. Was the signing of the roll after the decision considered as a simple carrying out of a conclusion and of a determination of the matter, or did the signing of the roll after the decision was rendered

involve a consideration of the party's status in the usual and o
dinary course of precedure?

A. That question I don't think could be answered fairly in ge
eral terms because there was a difference in cases. If the schedu
came up, with the record re-submitted, it meant one thing; but
the schedule came up unaccompanied with any record, in the latt
case it was a matter of form.

Q. If the schedule came up re-submitted was there an opportuni
afforded to the parties who would be affected by any different acti
being taken to be heard?

A. Well, I don't remember personally about that. The difficult
Mr. Merillat, arose largely during the last three months in regard
these schedules. I was not looking after the administrative featur
of it during these three months and I don't know how far th
went or what they did. I know this, though, that sometim
46 the schedules, when I was in the division—sometimes t
schedules would come up without any accompanying recor
whatever and sometimes the record of a report would accompan
a schedule. Now, it was my understanding that those schedul
sometimes came up with a new report or new record, or some reco
for reconsideration. Then it was a matter of discretion.

Q. Would you take away the rights of a party who had been a
judged by a formal decision to be entitled to rights without givi
him an opportunity to be heard upon any new charges or conte
tions?

A. Well, I was never in a position where that was put to me.

Q. Have you any knowledge of any case in which, after the par
was found entitled to rights, those rights were taken away by so
action beyond the actual schedule without notice and opportuni
to him to be heard?

A. In the Goldsby case—I think in the Swadley case the schedu
had been prepared there in accordance with the decree of the Sec
tary and the schedule came up and the schedule was disapprove
but I don't know when except by general recollection.

Q. Was that after February 19, 1907?

A. Yes, sir, I think, it is agreed that that statement is correct.

Asked if the signing of the roll was regarded as equivalent to t
signing of a land patent, he replied that he was not conversant wi
the practice of the General Land Office nor very well informed as
the legal effect of a patent in those days, and was not prepared
say. The practice assimilated to the land office practice. We h
verbal instructions from superior officers which he understood we
founded or predicated upon the General Land Office Practice.

Asked if when any question of practice arose, it was usual to ref
to the Land Office practice as a guide as to what should be the corre
practice in enrolment matters, witness answered:

A. Not as much in regard to enrolment matters as to land co
tests.

Q. Was a formal decision of the Secretary regarding enrolme

placed in the public archives regarded as of value or of no value to the applicant?

A. It was regarded as coming from the man who had the final say in the matter. It was regarded as final to the extent that I have described before that it would stand unless it was properly set aside.

Q. You say properly set aside. What do you mean by the phrase "properly set aside?"

A. It sometimes occurred that decisions of the Secretary were not agreeable to the attorneys for the tribes or the attorneys for the applicant in which case motions for rehearing and reconsideration were allowed.

On cross examination the witness said that he did not remember any case of an allotment certificate issuing to a man before his name got on the approved rolls. As to whether one would have a right to an allotment until his name was on an approved roll under the law, witness said that possibly in different tribes there was some difference as to that, as the laws were not uniform. For instance, 47 in some of the tribal agreements the right to select an allotment is set forth in connection with the party's right to an enrollment, but he did not know whether that was true in the Creek Nation. He did know that the Creek Land Office opened to selection of allotments April 1, 1891, and the Indians made their applications for allotment, but he didn't know whether the certificates followed as a matter of course, or were held up until the enrolment was decided.

There may have been rules of practice tantamount to regulations furnished by the Dawes Commission. He did not recall any formal printed regulations of practice at Washington in enrolment cases.

Witness had no personal knowledge as to the practice of the Indian Territory Division in the matter of giving notice of decisions during the last weeks of enrolment.

The decisions signed by the Secretary held the party was entitled and directed the Dawes Commission to enroll the party. In all such cases the decision would be followed later by a schedule containing the name of the party found in the decision entitled to enrolment. If the letter which accompanied the schedule presented any new matter for consideration the Commission would be instructed to reinvestigate that point and give the party an opportunity to be heard, if he had not already had it. The party would not be taken advantage of in any way. The only formality observed in respect to motions for rehearing or reconsideration was the requirement of notice to the other party. That, he did not remember was the subject of any rule committed to print, because he did not think the rules in enrolment cases were printed rules. It was the regular practice of the Department to require the party who filed a motion to serve it on the other party.

In the Sereno Bullock case a schedule was submitted by the Dawes Commission containing her name and the names of her children. This schedule was prepared by the Dawes Commission after March 4, 1907, in conformity with the decision the Commission had theretofore rendered. The Commission recommended that the action it

had previously taken be given the force of an enrolment. Th
schedule prepared was endorsed by the Secretary of the Interior, no
with the ordinary form of approval, but with a notation reciting tha
this certifies that the persons named above were enrolled by the de
cision of the Dawes Commission affirmed by the Secretary of the In
terior. That schedule had the general appearance and form of th
other schedules, except that the word approved did not appear upo
it, but instead there was the notation he had described. He did no
remember now whether it was the fact that in the Sereno Bulloc
case her name had been omitted inadvertently from a roll whic
had it been prepared and submitted to the Secretary prior to Marc
4, 1907, would have received his approval. He did not remembe
any adverse action having been taken in that ca- after the decisio
favorable to enrolment. Before March 4, the Secretary had decide
she was entitled to enrolment.

When the Dawes Commission passed upon the enrolment rights o
a person, it did not require any formal appeal on the part of an
party to bring up the question before the Secretary. The d
48 cision was forwarded as a matter of course, even if it were i
favor of the applicant.

There was no notice given out by the Secretary to applicants tha
their cases were before him, but when the Dawes Commission decide
they sent out their notice they were about to forward the case to th
Secretary, and when it reached the Secretary we acted on it whe
we got to it. The Secretary did not give any preliminary notice un
less some one inquired as to the status. It was simply usage, but
was recognized that it was due the public and all inquiries were an
swered as matter of course. It was the well settled practice if a part
who made the request for inspection of letter books and letters bea
ing upon enrolment rights of a person, had a power of attorney t
let him know what was being done, and it was recognized that an
party in interest should be permitted to see what had been don
That is the general rule that prevails in the Interior Department.

There was in the Assistant Attorney General's office a docket roo
where land decisions were exhibited on a file and any persons we
at liberty to go through them and see them. He did not kno
whether that was what would be called a promulgation of decision
It was for the benefit of the public.

The same system of displaying decisions that prevails in the A
sistant Attorney General's office was not in vogue.

Enrolment matters were not handled in the same way in th
Indian Territory Division, but they had a recording room and pe
sons making inquiry as to the status of their case could go there an
find out. A good many out of town people came there. A case w
open for inspection only for people who could show they had som
right or authority to see it. The decisions were kept in a press co
book that was ordinarily closed to people, and people wanting to s
them went first to the chief of division and getting permission we
to the room, and the letter books would be gotten for them. The
were two sets of record books: one containing letters to officials, an

the other to non-officials. There was no distinction between the two sets so far as concerns availability to the entire public having a legitimate interest in their contents. The books were available to any one having enrolment or allotment interests. There was no standing order that in every case a copy would be mailed directly from the Indian Territory Division to the applicants. The system contemplated notice to the parties through the local office, the Dawes Commission. As a general rule, notices of decisions were not mailed directly from the Secretary's office, but in exceptional instances notices were mailed directly from the Secretary's office to interested parties. This was in cases where some special inquiry had been made about the case, and also wherever the party was represented by local counsel in Washington. The chief method of routine distribution was by sending out notices of decisions to the Dawes Commission, which in turn transmitted them to parties in interest.

Parties might come back—there was no limit—and many of them did, with matters for reconsideration. Repeatedly the Commission was instructed to notify a party that he would be allowed ten days or thirty days or sixty days to file a motion for reconsideration. It was very common to fix a time limit in order to expedite the work, but it was always a reasonable limit. The text of the Department letter in the Jennie Johnson case followed the usual form except that it was rather shorter than the usual decision.

On redirect examination witness testified that there were cases that were never taken up in less than thirty days from the time the case reached the Secretary's office until towards the close, when the pressure became very great. While as a rule notices were not sent out through the Secretary's office, the intention was to delegate the work to subordinate offices, ordinarily the Dawes Commission, but also the Indian office if inquiry was made at that office. Where there were Washington counsel in a citizenship case notices were promptly given the local attorney either from the Secretary's office or the Indian Office, and this promulgation was generally handled at the same time the decision was signed.

On recross examination witness stated that the Dawes Commission when they decided a contested case did not put the name on the roll until they heard regarding the case that the Secretary had acted favorably.

On further redirect examination witness testified that he recalled that in the case of the Riley family the Secretary did not decide the case until ten o'clock on March 4, 1907, and that the schedule was signed at the same time. The Dawes Commission in the last few days had a representative here to prepare the rolls when the Secretary had passed on cases.

Thereupon the plaintiffs announced that their case was closed.

The defendant thereupon to sustain the issues on his part joined offered the following testimony:

WILLIAM H. ANGELL, of Muskogee, Oklahoma, testified on written interrogatories and cross-interrogatories that he was a clerk in the office of the Superintendent for the Five Civilized Tribes, and that between 1899 and 1907, except for a short period devoted to appraising land, his work had been confined to enrolment and allotment matters in the Five Tribes. It was the practice of the Dawes Commission to notify interested parties of favorable or unfavorable decisions rendered by the Commission in contested enrolment matters, and similarly to notify them of the decision of the Secretary of the Interior, whether favorable or unfavorable.

The official records at Muskogee with reference to the application of the relators for enrollment in the Creek Nation, he testified, showed as follows:

On February 23, 1907, the Secretary of the Interior directed the Commissioner to the Five Civilized Tribes to inspect the partial rolls for the purpose of determining what persons had been enrolled thereon contrary to the views expressed in the opinion ren-
50 dered by the Attorney General on February 19, 1907, holding, among other things, that the decisions of the Commission under the Act of June 10, 1896, not appealed, and of the Choctaw-Chickasaw Citizenship Court were final, whether names were on the tribal rolls or not. The Commissioner considered that the case of Jennie Johnson and her children came under this decision. As their names were not placed on a schedule or a roll for the approval of the Secretary of the Interior, on February 27, 1907, the Commissioner recommended to the Department that his decision of September 25, 1906, be not concurred in, and that the decision of the Commission to the Five Civilized Tribes of May 11, 1901, be allowed to stand; that on March 4, 1907, the Secretary of the Interior rescinded his action of February 19, 1907, reversed the Commissioner's decision of September 25, 1906, and affirmed the decision of the Commission of May 11, 1901, denying the application of Jennie Johnson et al., for enrolment.

On May 4, 1907, the Commissioner transmitted for Departmental consideration a motion filed by the attorneys for Jennie Johnson to set aside the order of the Secretary of the Interior of March 4, 1907, which motion was dismissed by the Secretary of the Interior.

The records also show that the names of Jennie Johnson and her children were placed on the rolls of doubtful Creek citizens by the Creek National Council, and that their names were not placed on the 1895 pay roll; that on July 24, 1895, Jennie Johnson made application for the reinstatement of herself and four children as Creek citizens, to the Creek Citizenship Commission, created under the provisions of the act of the Creek National Council approved May 30, 1895, and that said Commission did not readmit her and her children as Creek citizens or reinstate their names upon the Creek tribal roll. The record shows that on September 25, 1906, the Commissioner to the Five Civilized Tribes recommending her and their enrolment, said decision was affirmed by the Secretary on February 19, 1907; that on February 23, 1907, the Commission was notified by telegram

to correct the rolls in accordance with the decision of the Attorney General in the case of Loula West et al.; that on February 27, 1907, the Commissioner wrote to the Secretary that the case of Jennie Johnson et al. "now before the Department for consideration" fell within the terms of the Loula West decision and recommended that his decision of September 25, 1906, be not concurred in, and that a former decision denying enrolment should be allowed to stand; that in said letter the Commissioner said nothing about the Secretary's letter of February 19, 1907, affirming the Commissioner's decision of September 25, 1906, but in a telegram dated March 1, 1907, said Commissioner called attention to the Secretary's letter of February 19, to his report of February 27, 1907, aforesaid, and recommended that enrolment be denied; and that on March 4, 1907, the Secretary addressed a communication to said Commissioner, acknowledging receipt March 2, 1907, of said report and recommendation of February 27, 1907, and rescinded his letter of February 19, 1907, and affirmed the Commissioner's earlier decision denying enrolment, and stated:

51 If these applicants have been placed upon the roll of citizens of the Creek Nation, their names are hereby canceled from said roll, and you are authorized to strike their names from the copy of the roll in your possession. The Indian Office will take like action, and the Department will also take such action.

The records of the office showed that the names of Jennie Johnson and the other relators never were placed on any schedule or roll of the citizens of the Creek Nation by the Dawes Commission, and that no schedule containing their names was ever approved by the Secretary of the Interior. It did not appear from the records that any notice was ever given Jennie Johnson after February 19, 1907, stating that her enrolment had been favorably considered by the Secretary. The letter of the Secretary of February 19, 1907, was not received until February 23, 1907. The records show that the Commissioner had no knowledge of the Secretary's letter of February 19, 1907, until February 23, 1907, when he received the telegram advising him of the opinion of the Attorney General of February 19, 1907, which, in effect, held that Jennie Johnson and her children were not entitled, and which resulted in the recommendation, February 27, 1907, by the Commissioner to the Secretary, that the Commissioner's decision of September 25, 1906, be not concurred in, and that the decision of May 11, 1901, denying their application, be allowed to stand; which was concurred in by the Secretary, March 4, 1907.

On cross examination, witness testified that the Creek tribal roll of 1890 was an authenticated roll of Creek Citizens and was recognized by the Creek Citizens and authorities. This 1890 Creek tribal roll was made pursuant to an act of the National Council of the Creek Nation approved October 29, 1890, and was certified to on November 21, 1890, by L. C. Perryman, then Principal Chief of the Creek Nation. This roll contained the names of Jennie Johnson, Cleran Johnson and Fannie Johnson of the relators.

The co-called Committee of Eighteen of the Creek tribe was appointed under the provisions of an act of Congress in the Creek

Council to correct the Creek rolls and expunge names of noncitizens therefrom. The records showed that in 1895 and 1896 the Creeks did not place on the 1895 and 1896 supplemental rolls the names of many persons whose names appear on the 1890 roll, who were found noncitizens or doubtful citizens. Some persons were reinstated on the rolls and others were refused reinstatement or denied citizenship by the Citizenship Commission.

Prior to February 19, 1907, in all contested Creek enrolment matters it was the practice to give all interested parties an opportunity to be heard as to their rights by serving proper notice upon them. Allotments were permitted to be selected by persons declared entitled to enrolment by the Secretary of the Interior prior to actual final approval of the rolls, but these allotments selected were subject to cancellation in the event of disapproval of enrolments of any persons by the Secretary of the Interior.

Q. Is it not the fact that the stamping "approval" and the actual signature of the rolls were regarded as merely formal and perfunctory, prior to February, 1907?

52 The witness responded:

A. I do not consider it in this light, as, under the law, the enrolment of no person became final until his name was placed on a roll and such roll approved by the Secretary of the Interior.

Q. Is it not the fact that whether enrollment had merely been ordered or the order had been carried into effect by the preparation of the rolls and the signature of the same by the Secretary of the Interior that the Dawes Commission and the Secretary of the Interior both held there was the right, and exercised the right to refuse enrolment if the roll were not signed, or, if the roll were signed, to cancel a name on the roll for cause prior to March 4, 1907?

A. Yes.

Q. Is it not the fact that wherever action was taken of the nature set forth in Cross-Interrogatory No. 10 it was uniformly, prior to February 19, 1907, taken only after the party to be affected thereby had full notice and opportunity to be heard and to defend such party's right to be on the rolls?

A. No.

Asked to give any case where this had been done before February 19, 1907, without the party in question having an opportunity to be heard, witness said the name of Timmie Lee, Creek by blood, had been stricken by order of the Department, without notice.

The rules and regulations governing enrolments approved by the Secretary of the Interior March 26, 1901, made provision for the recognition and government of attorneys and agents representing citizenship claimants, and for motions for rehearings and reviews, before each and all the officials passing at successive stages on enrolment cases. This right of rehearing was refused or accorded both after rendition of the decisions of the Dawes Commission and of final decision by the Secretary. After the act of April 26, 1906, the only

difference was that a motion for rehearing or review must be filed within 60 days.

Formal decisions were not rendered in many noncontested cases where it clearly appeared that the applicants were entitled to enrolment, but the enrolment of such applicants was not considered final until approved by the Secretary—that is, until the names of the applicants were placed on a roll and such roll approved by the Secretary of the Interior.

Q. Where the right was not clear or there was objection by the nation, is it not the fact that a formal decision was rendered by the Dawes Commission and the Secretary's decision thereon as announced by him treated and regarded as establishing the right to enrolment or not of the party affected? (See page 26 of Report of Dawes Commission for 1904.)

A. Yes, but it was considered that the right to enrolment of any person was not finally established until his name had been placed on a roll and such roll approved by the Secretary of the Interior.

Q. Is it not the fact that the actual physical enrolment
53 and approval of rolls where the party's right to enrolment had been contested followed as matter of course upon a favorable final decision being signed by the Secretary?

A. Yes. The enrolment of a person was not considered final, however, until his name had been placed on a roll and such roll approved by the Secretary of the Interior. In such cases the person was permitted to select an allotment but same was subject to cancellation in the event his enrolment was not approved by the Secretary.

Q. Is it not the fact that after enrolment had been ordered in a contested case the party affected was accorded the same rights as to selecting an allotment or sharing in tribal funds as where the roll containing the party's name had been actually inscribed and approved?

A. Yes, but the enrollment of any person was not considered final until his name had been placed on a roll and such roll approved by the Secretary of the Interior. The party affected might have instituted an allotment contest, which contest would have been dismissed and the land involved awarded to the contestee in the event that the contestant's name was not placed on the final roll, and such roll approved by the Secretary of the Interior.

Q. Is the statement in the annual report of the Dawes Commission, dated June 30, 1905, pages 8 and 9, as follows: "Enrolment of Citizens, * * * The work of enrolling the members of the Five Tribes in Indian Territory may be classed under three general heads;

First, the reception of applications for enrolment.

Second, the determination of the rights of the applicants.

Third, the actual placing of the names of these entitled to be enrolled upon the final rolls for approval by the Secretary of the Interior.

The third is a perfunctory one which consumes little time, accuracy being the most important factor, a true and correct statement of the situation up to and including February 18, 1907.

A. This statement is substantially correct, but is somewhat misleading in that it might lead to the belief that the enrolment of a person was actually completed upon the rendition of a favorable decision of the Secretary in his case and before his name had been placed upon a roll and such roll approved by the Secretary of the Interior.

There was offered in evidence the following telegram pursuant to which the adverse action had been taken in the case of petitioners and others personally held entitled by the Secretary of the Interior to be entitled to enrolment and allotment:

Telegram.

L. R. S. F. L. C. L. L. B.

Y. P.

Washington, February 23, 1907.

Bixby, Commissioner, Muskogee, Indian Territory:

You are directed to inspect the partial rolls of citizens of the Choctaw and Chickasaw nations to determine what persons
54 have been enrolled thereon contrary to the views expressed by the Attorney-General in opinion of February 19, copy sent you this day, and whose names should be stricken therefrom. You will furnish the Department a list of such names, with roll numbers, and give such information that it may readily determine whether such names should be stricken from the rolls. This information should reach the Department before March first. Take like action relative to the rolls of Cherokee and Creek nations.

It was held in such opinion, among other things, that the decisions of the Commission under act of 1896, not appealed from, were final, and that the decisions of the Choctaw and Chickasaw Citizenship Court were final, whether claimant's name was on tribal rolls or not.

Decisions of the Department, based upon opinions of the Assistant Attorney-General, in favor of claimants in the case of Loula West et al., William C. Thompson et al., and Richard P. Coleman et al., are rescinded in letter to you this day. The decision of the Department in the Ethel Pierson case, minor child of a Choctaw freedman, is sustained in the opinion of the Attorney-General.

E. A. HITCHCOCK,
Secretary.

I. T. D. 4564-1907.

The parties then stipulated and agreed that the several letters and telegrams set forth in respondent's amendment to the return to the rule to show cause, to wit, the letter dated February 19, 1907, the telegram dated February 23, 1907, the letter dated February 27, 1907, the telegram dated March 1, 1907, and the letter dated March 4, 1907, are copies of the originals on file in the Department of the Interior (save as to formal parts, such as addresses, etc., which were omitted) and that the same should be regarded and treated as part

of the evidence introduced by the respondent the same as if formally introduced at the taking of testimony.

Thereupon counsel both for petitioners and for defendant announced their case was closed and the same was fully argued before the court, which took the case under advisement and later handed down an opinion and finding as follows:

This is a petition for a writ of mandamus to require Franklin K. Lane as Secretary of the Interior to place the name- of the petitioners or cause the same to be placed on the approved rolls of the members or citizens by blood of the Creek Nation, and to accord to the petitioners the status and rights belonging to blood members on the approved rolls of the Creek Nation of Indians. An amended petition was filed and the Secretary filed an answer and amended answer to which the petitioners demurred. The demurrer was overruled and the matter is again before the Court after the taking of testimony.

The material allegations of the answer and amended answer are supported by the evidence and upon the hearing the only additional authority cited by the petitioners was The United
55 States v. Wild-cat et al., decided by the Supreme Court of the United States on May 21, 1917, which case however does not sustain the contention of the petitioners.

The writ must therefore be refused.

Settled decree on two days' notice.

By the Court:

WALTER I. McCOY,
Justice.

Thereupon, on coming into court, counsel for petitioners duly in open court noted an exception to the finding of the court that the rules, regulations and practice of the Interior Department did not provide for hearing or opportunity to be heard before a decision in their favor could be revoked and canceled;

Also an exception to the finding of the court that petitioners were not entitled to a hearing or opportunity to be heard before the decision of the Secretary of the Interior in their favor could be revoked and canceled.

Also an exception to the failure of the court to find that after a decision of the Secretary of the Interior in their favor the signing and approval of the rolls were mere ministerial acts in the absence of a reopening of the cause by appropriate proceedings and hearing or opportunity to be heard thereon;

And asked that the same be noted on the minutes of the court and the same by the court were allowed and ordered noted on the minutes of the court now for then this 26th day of October, A. D. 1917.

And thereupon the Court signed the following judgment:

Judgment.

This case came on further to be heard at this term: and thereupon, upon consideration thereof, it is, this 26th day of October, 1917,

Ordered and adjudged, that the rule to show cause herein issued be, and the same is, hereby, discharged, that the relators' petition for the writ of mandamus be, and the same is, hereby, dismissed, and that respondent recover his reasonable costs to be taxed by the clerk and have execution therefor.

By the Court:

WALTER I. McCOY,
Justice.

And thereupon the petitioners again noted the exceptions hereinbefore set forth noted by them to the findings of the Court after the rendition of the court's opinion and findings, and asked that the same be noted on the minutes of the court, and the same by the court were allowed and ordered noted on the minutes of the court at the time of the signing of the judgment aforesaid. And thereupon from the aforegoing judgment, the relator- on the 26th day of October, 1917, prayed an appeal in open court to the Court
56 of Appeals for the District of Columbia, and the same is hereby allowed; whereupon the penalty of a bond for costs on appeal is hereby fixed in the sum of $100, with leave to the relator- to deposit the sum of $50 with the Clerk of the court in lieu of said bond.

By the Court:

WALTER I. McCOY,
Justice.

Be it further remembered that the foregoing comprises all the evidence that was adduced at the trial of this cause and all the proceedings that took place at the trial and that each of the several and separate exceptions taken by counsel for the petitioners and hereinbefore set forth was so taken by counsel for the petitioners then and there and each of said exceptions was separately and severally duly entered upon the minutes of the Justice presiding at the trial and counsel for petitioners now pray the Court to sign and seal this bill of exceptions and the same is accordingly signed and sealed and made part of the record in this cause now for then this the 30th day of January, 1918.

By the Court:

WALTER I. McCOY,
Justice.

Endorsed on cover: District of Columbia Supreme Court. No. 3157. The United States of America ex rel. Jennie Johnson et al., Appellants, vs. Franklin K. Lane, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Feb. 15, 1918. Henry W. Hodges, clerk.

57 Tuesday, October 8th, A. D. 1918.

* * * * * * *

No. 3157.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, MARY F. STREET, Formerly Mary Fanny Johnson; Jennie B. Wallace, Formerly Jennie Belle Johnson, et al., Appellants,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The argument in the above entitled cause was commenced by Mr. C. H. Merillat, attorney for the appellants, and was continued by Mr. C. E. Wright, attorney for the appellee, and was concluded by Mr. C. H. Merillat, attorney for the appellants.

58 In the Court of Appeals of the District of Columbia.

No. 3157.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, MARY F. STREET, Formerly Mary Fanny Johnson; Jennie B. Wallace, Formerly Jennie Belle Johnson, et al., Appellants,

v.

FRANKLIN K. LANE, Secretary of the Interior.

Opinion.

Mr. Chief Justice SMYTH delivered the opinion of the Court:

The appellants, claiming to be blood Indian members of the Creek Tribe or Nation of Indians in the State of Oklahoma, applied to the court below for a writ of mandamus directed to the Secretary of the Interior, and commanding him to place their names upon the approved rolls of the members of that nation and to accord to them the status and rights belonging to such members. The application was denied and they appeal.

The act of Congress, June 28, 1898 (30 Stat., 495), authorized and directed the Dawes Commission "to make correct rolls of the citizens by blood" of the Five Tribes of Indians of which the Creek Nation was one. Under the act of March 1, 1901 (31 Stat., 861, 870), ratified by the Creek Nation, it was provided that "all citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under * * * the act approved June twenty-eighth, eighteen hundred and ninety-eight, * * * shall be placed upon the rolls to be made by said Commission," and that the rolls thus made, "when approved by the Sec-

retary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons." The Dawes Commission was abolished in 1904 (33 Stat., 189), and all its powers were vested in the Secretary of the Interior after July 1, 1905, by the act of March 3, 1905 (33 Stat., 1048, 1059). This latter act provided that the "work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior." To aid him in the performance of this work the Secretary, on June 26, 1905, selected Tam Bixby whom he designated as a "commissioner." This commissioner had no statutory or other authority except that derived from the Secretary by virtue of his appointment.

The appellants; Jennie Johnson and her children, applied to Bixby to have their names placed upon the roll of the Creek Nation. Bixby examined their claims, found that they were entitled to be enrolled and granted their application, September 26, 1906. He was then in Muskogee, Indian Territory, from which place he forwarded his decision to the Commissioner of Indian Affairs for his consideration. On February 15, 1907, the acting Commissioner of Indian Affairs recommended to the Secretary of the Interior that the decision be approved. A few days thereafter the Acting Secretary wrote to Mr. Bixby at Muskogee that his decision had been affirmed. On the same day on which he received this letter he also received a telegram from the Secretary to the effect that the Attorney General had rendered an opinion which was inconsistent with the decision which had been reached by the Department of the Interior in certain cases affecting the rights of the Indian tribes. Upon an examination of this opinion the commissioner reached the conclusion that it was not in harmony with his decision in the Johnson case, and he, on February 27th, wrote to the Secretary asking that his decision in that case be not concurred in. This letter, it appears, was sent before he had received the Acting Secretary's letter affirming his decision. March 1st, not having received any response to his letter of February 27th, he wired the Secretary calling attention to the letter and his recommendation therein. The Secretary, on March 4th, rescinded the action of the Acting Secretary in approving the commisioner's decision, and on the same day notified Mr. Bixby.

59 Up to this time the names of the appellants had not been placed upon the rolls in response to the recommendation of the commissioner, nor have they ever been placed there, and of course the rolls with their names upon them were never approved by the Secretary of the Interior as required by the act of March 1, 1901, supra.

The act of March 26, 1906 (34 Stat., 137), provided "that the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve enrollment of any person after that date."

The Creek Nation is one of the tribes affected.

The contention of the appellants is that the *the* letter of the Assistant Secretary of the Interior, February 19, 1907, affirming the action of Commissioner Bixby, gave to them the right to have their names placed upon the rolls; that this right could not be taken from them without notice and an opportunity to be heard; that the action of the Secretary canceling his affirmance of the commissioner's decision is void; and hence that it is the clear duty of the present Secretary of the Interior to place their names upon the rolls.

There are two answers to this contention. In the first place, it is provided by the act of 1906, supra, that after the 4th of March, 1907, "the Secretary of the Interior shall have no jurisdiction to approve enrollment of any person." If we should now grant the application of the appellant to direct the Secretary to place their names upon the rolls and approve their enrollment, we would require him to do that which under the act of Congress he has no power to do. That we may not do this is so obvious that argument is unnecessary. Of course if, as in Garfield v. Goldsby (201 U. S., 249), the Secretary, after having approved the enrollment of the appellants, had struck their names from the rolls without notice, the question would be quite different. In such a case they would be deprived, without due process, of the right accruing to them by the enrollment.

In the second place, the appellants were given no right by the affirmance of Commissioner Bixby's decision. He did not hold an office created by statute. He had no powers but those given to him by the Secretary of the Interior. Until his action was approved by the Secretary, it had no legal effect. When approved it became the act of the Secretary. Even then it was nothing more than a declaration that the appellants were entitled to be enrolled. The statute under which appellants' claim attached no legal significance to such a declaration. Their rights could come, not from a communication by the Secretary to one of his subordinates, like Commissioner Bixby, that in his judgment they were entitled to enrollment, but from the fact of enrollment, coupled with the Secretary's approval thereof. This is manifest from the act of March 1, 1901, supra, which says that the rolls "when approved by the Secretary of the Interior" shall be the rolls "upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons." By revoking his action in affirming the decision of Commissioner Bixby, the Secretary, in the exercise of the discretion vested in him by Congress, decided, while he still had jurisdiction of the matter, that the appellants were not entitled to enrollment, and the discretion thus exercised is not subject to the control of the courts. United States ex rel. Ashley v. Roper, 48 App. D. C., 69, 75, and cases cited there.

There is no analogy between this case and public land cases in which a party makes proofs which are accepted by the local land office and pays his money for the land. In such cases the receiver's final receipt "is an acknowledgment by the Government that it has received full pay for the land and that it holds the legal title in trust for the entryman and will in due course issue to him a patent." United States v. Detroit Lumber Co., 200 U. S., 321, 337. The

entryman's equity is based on what he did at the invitation of t Government, but here the appellants did nothing of that charact In truth they are not predicating their claim upon anything do by them but on the act of the Secretary of the Interior which, as have seen, gave them no right or privilege.

The judgment of the lower court is affirmed, with costs. Affirm

60 Monday, November 4th, A. D. 1918.

* * * * * * *

No. 3157, October Term, 1918.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, MA F. STREET, Formerly Mary Fanny Johnson; Jennie B. Walla Formerly Jennie Belle Johnson, et al., Appellants,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the rec from the Supreme Court of the District of Columbia and was argu by counsel. On consideration whereof, it is now here ordered a adjudged by this Court that the judgment of the said Supreme Co in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SMYTH

November 4, 1918.

61 Friday, December 6th, A. D. 1918.

* * * * * * *

No. 3157.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, MA F. STREET, Formerly Mary Fanny Johnson; Jennie B. Walls Formerly Jennie Belle Johnson, et al., Appellants,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

The motion for the allowance of a writ of error to remove above entitled cause to the Supreme Court of the United States submitted to the consideration of the Court by Mr. C. H. Merill attorney for the appellants, in support of motion.

Thursday, January 9th, A. D. 1919.

* * * * * * *

No. 3157.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON et al., Appellants,

vs.

FRANKLIN K. LANE, Secretary of the Interior.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States, it is by the Court this day ordered that said motion be and the same is hereby denied.

62 Supreme Court of the United States.

No. —.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, MARY F. STREET, Formerly Mary Fanny Johnson; Jennie B. Wallace, Formerly Jennie Belle Johnson, and Jennie Johnson, as Next Friend of Walter Johnson and John B. Johnson, Minors, Plaintiffs in Error, Petitioners,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Respondent.

Petition for Writ of Error.

Now come the petitioners and pray the allowance of a writ of error to the Court of Appeals of the District of Columbia to remove the above entitled cause to this court.

The writ of error is sought under paragraphs 3 and 5 of section 250 of the Judicial Code of the United States. Petitioners claim they have been deprived arbitrarily, without due process of law and by a special blanket order that denied them the equal protection of the laws, of rights and privileges to which they had been duly adjudged by the Secretary of the Interior entitled under statutes, rules and practice in force at the time of the decision requiring that at each stage of procedure notice and hearing should be given applicants for Indian citizenship with opportunity to know the issues involved and to defend. The rights decreed in them by the decision of the Secretary after notice and hearing were taken from them without notice or opportunity to be heard pursuant to the said blanket telegraphic order departing from the customary procedure.

This cause sought to be appealed by writ of error is one seeking by mandamus to compel the Secretary of the Interior to enroll the peti-

tioners as blood members of the Creek tribe of Indians or recognize them as already having such an enrollable status and the rights consequent thereon.

63 The conceded facts are that the Secretary of the Interior duly on the written recommendation of the Commissioner of Indian Affairs on February 19, 1907, formally in writing affirmed a decision dated September 25, 1905, by the Commissioner to the Five Civilized Tribes holding petitioners entitled to be enrolled as blood members of the Creek tribe and the Secretary by his decision placed in the public files in the usual manner and duly transmitted to his subordinate directed a roll containing petitioners' names to be prepared for his signature. This was done after notice and hearing to all parties concerned.

Thereafter on March 4, 1907, without notice or hearing, the Secretary of the Interior pursuant to a report made in answer to a blanket telegraphic order he had sent the Commissioner to the Five Tribes rescinded and reversed his decision and directed that if petitioners' names had been placed upon the rolls approved by him their names should be cancelled from said rolls.

This court decided in Garfield vs. United States ex rel. Goldsby 211 U. S. 249, that this cancellation without notice or hearing was unconstitutional and void, and that mandamus would lie, and in United States ex rel. Lowe vs. Fisher, 223 U. S. 95, that such cancellation, with notice and hearing was lawful and mandamus would not lie.

Under the proven and conceded facts from the moment the Secretary's "decision" was signed by him holding an applicant entitled to enrolment and prior to a roll prepared pursuant to the announced "decision" being physically prepared and signed by the Secretary the party decreed entitled under the rules and practice promulgated by the Secretary had the right to "select" his allotment of 160 acres, this "selection" ripening into patent if the decision or actual enrolment was not duly and with notice set aside prior to March 4, 1907, the day the rolls closed, and this "selection" being held by the Supreme Court of Oklahoma and the federal courts to be saleable from the moment of "selection" in the absence of special statutory restrictions on alienation. Petitioners had the right to but had not actually made their selections prior to March 4, 1907.

64 On the same day the Secretary signed the decision holding petitioners entitled and directing their enrolment, February 19, 1907, Attorney General Bonaparte rendered an opinion in certain Choctaw and Chickasaw citizenship cases holding decisions of the special Choctaw-Chickasaw citizenship court on citizenship cases to be final and a bar to consideration of such cases on the merits under the Choctaw-Chickasaw agreement of 1902. The Creek agreements are radically different from the Choctaw-Chickasaw agreement and there was no Creek Citizenship court but all Creek enrolment matters were under the jurisdiction of the Secretary of the Interior.

The Secretary misapplied Attorney General Bonaparte's opinion to apply to all tribes and on February 23, 1907 sent the blanket

telegraphic order held void in the Goldsby case supra, directing cancellation of all enrolments and decisions that might be deemed in any of the tribes to come within the purview of the Bonaparte opinion regardless of prior decisions on the merits.

Rolls containing petitioners' names had not yet been physically prepared and signed by the Secretary so their names were not canceled on the rolls, but on March 4, 1907, the decision in their favor was canceled without notice or opportunity to be heard. Except in the matter of actual enrolment and cancellation the cases are identical with the Goldsby case. Petitioners contend a lawfully adjudged right to enrolment is equivalent to enrolment, at least to the extent that notice and hearing is a constitutional right and right recognized in the laws governing the exercise of enrolment jurisdiction by the Secretary of the Interior.

The Supreme Court of the District of Columbia dismissed the mandamus petition and on November 4, 1918, the Court of Appeals of the District of Columbia affirmed that decision. On December 6, 1918, petitioners moved the said Court of Appeals for allowance of a writ of error to the Supreme Court under section 250 of the Judicial Code. On January 9, 1919, the said Court of Appeals denied the motion for allowance of a writ of error. Petitioners therefore apply to this Court for a writ of error under said
65 section 250.

Assignments of error and a fuller statement of the case accompanies this petition.

CHARLES H. MERILLAT,
Attorney for Petitioners, Plaintiff- in Error.

(Endorsed:) No. 3157. U. S. ex rel. Jennie Johnson et al. vs. Franklin K. Lane, Secretary. Petition for Writ of Error. Court of Appeals, District of Columbia. Filed Feb. 3, 1919. Henry W. Hodges, Clerk.

66 In the Supreme Court of the United States.

No. —.

THE UNITED STATES OF AMERICA ex Rel. JENNIE JOHNSON, MARY F. STREET, Formerly Mary Fanny Johnson; Jennie B. Wallace, Formerly Jennie Belle Johnson, and Jennie Johnson, as Next Friend of Walter Johnson and John B. Johnson, Minors, Petitioners, Plaintiffs in Error,

vs.

FRANKLIN K. LANE, Secretary of the Interior, Respondent.

Assignment of Errors.

The Plaintiffs in error, petitioners in the trial court, state that the Court of Appeals of the District of Columbia in its opinion and judgment affirming the judgment of the Supreme Court of the Dis-

trict of Columbia dismissing the petition for the writ of mandamus filed by plaintiffs in error erred as follows:

1. In affirming the judgment of the Supreme Court of the District of Columbia dismissing the petition for writ of mandamus.

2. In not reversing the court below and directing that the writ of mandamus should issue requiring the Secretary of the Interior to grant to or recognize petitioners as having the status of enrolled blood member- of the Creek tribe of Indians.

3. In refusing to hold that petitioners had been denied due process of law when, after Secretary of the Interior Hitchcock had duly adjudicated petitioners entitled to be enrolled as blood members of the Creek tribe of Indians with notice and hearing afforded all parties in interest and had directed that rolls containing their names should be prepared for his signature the said Secretary thereafter by blanket order and without notice or hearing undertook on March 4, 1907, to cancel, annul or revoke the prior determination that petitioners should be enrolled as Creek tribal members.

CHARLES H. MERILLAT,
Attorney for Plaintiffs in Error.

4. In refusing to hold that petitioners had been denied the equal protection of the laws by the action of the Secretary of the
67 Interior in undertaking by special blanket order and actions taken thereunder and without hearing to revoke, cancel and annul his adjudication that petitioners should be enrolled as blood members of the Creek tribe, such adjudications having been made under statutes, ruled and settled practice that required notice and hearing to be granted of all proceedings in applications for enrollment.

5. In not finding that the attempted cancelation, revocation or annulment of the adjudication of the Secretary of the Interior that petitioners were entitled of right to enrolment was unconstitutional and void and that petitioners therefore were entitled to enrollment under the only lawful proceedings had in their cases.

6. In holding that even if it appeared that petitioners had been lawfully and properly adjudicated entitled to enrollment and that they had been denied the benefits of this adjudication by unconstitutional acts of the Secretary that the courts could not by mandamus compel the Secretary of the Interior after March 4, 1907, to accord petitioners the status of enrolled members of the Creek tribe inasmuch as it appeared that their names had not been physically enrolled prior to March 4, 1907, and by the act of March 26, 1906, it was provided that after March 4, 1907, "The Secretary of the Interior shall have no jurisdiction to approve enrollment of any person."

7. In ignoring the fact that the Secretary of the Interior after March 4, 1907, had granted enrollable status to a number of citizens of the Five Tribes who prior to March 4, 1907, had been held by him in decisions to be entitled to enrollment but whose names through inadvertence had been overlooked and not actually placed on the approved rolls prior to March 4, 1907, the Secretary holding under an opinion of the Assistant Attorney General for his Depart-

ment that there was no reason for denial of their enrollment "except a seeming defect in the purely clerical matter of making up the final lists or roll schedules" and that the sound view is that the
68 Secretary's favorable decision in itself constitutes an enrollment, and that the preparation subsequently of the schedules based thereon is purely ministerial and clerical.

8. In holding that the decision of the Secretary of the Interior after contest affirming the decree or finding of the Commissioner to the Five Tribes that petitioners were entitled to enrollment and directing enrollment of their names on roll schedules to be signed by the Secretary was "nothing more than a declaration that the petitioners were entitled to be enrolled" and did not result in rights of which they could be deprived only after notice and hearing or opportunity to be heard on any supposed new issue arising, in view of the fact that it is conceded that at once upon the Secretary announcing a decision in their favor the petitioners were entitled to "select" allotments of land and contest the "selections" of other tribal members, and that under the agreement between the United States and the Creek tribe of Indians (section 8) approved March 1, 1901, (— Stat., —) it was provided that upon "selection" of an allotment the United States Indian Agent should place the citizen selecting same "in unrestricted possession of his land and remove therefrom all persons objectionable to him."

9. In holding in effect that while settlers on the public domain who had entered public land at the invitation of the government had acquired an equity of which they could not be deprived without notice and a hearing that no equity requiring such notice and hearing resulted to an applicant for Indian citizenship who had been decided entitled to enrollment and allotment after proceedings duly had.

10. In denying to plaintiffs in error a writ of error to the Supreme Court and holding that their cases did not come within either the third or fifth paragraph of section 250 of the Judicial Code of the United States (36 Stats., 1087).

CHARLES H. MERILLAT,
Attorney for Plaintiffs in Error.

(Endorsed:) No. 3157. U. S. ex rel. Jennie Johnson et al. vs. Franklin K. Lane, Secretary. Assignment of Errors. Court of Appeals, District of Columbia. Filed Feb. 3, 1919. Henry W. Hodges, Clerk.

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America ex rel. Jennie Johnson, Mary F. Street, formerly Mary Fanny Johnson;

Jennie B. Wallace, formerly Jennie Belle Johnson, and Jenni Johnson, as next friend of Walter Johnson and John B. Johnson minors, Appellants, and Franklin K. Lane, Secretary of the Interior Appellee, a manifest error hath happened, to the great damage o the said appellants, as by their complaint appears. We being willin that error, if any hath been, should be duly corrected, and full an speedy justice done to the parties aforesaid in this behalf, do com mand you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of th United States, together with this writ, so that you have the same i the said Supreme Court at Washington, within thirty days from th date hereof, that the record and proceedings aforesaid being in spected, the said Supreme Court may cause further to be done therei to correct that error, what of right, and according to the laws an customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of th United States, the first day of February, in the year of our Lord on thousand nine hundred and nineteen.

[Seal of the Supreme Court of the United States.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb 3, 1919. Henry W. Hodges, Clerk.

70 Know all men by these presents, that we, Jennie Johnson Mary F. Street, Jennie B. Wallace, and Walter Johnson an John B. Johnson, minors, by their next friend, Jennie Johnson, a principal, and United States Fidelity and Guaranty Company, corporation of the state of Maryland, as sureties, are held and firml bound unto Franklin K. Lane, Secretary of the Interior, in the ful and just sum of Five Hundred dollars to be paid to the said Franklin K. Lane, Secretary of the Interior, his certain attorney, successors or assigns; to which payment, well and truly to be made, we bind our selves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this first day o February, in the year of our Lord one thousand nine hundred an nineteen.

Whereas, lately at a term of the Court of Appeals of the District o Columbia in a suit depending in said Court, between The Unite States of America ex rel. Jennie Johnson, Mary F. Street, formerl Mary Fanny Johnson; Jennie B. Wallace, formerly Jennie Bell Johnson, and Jennie Johnson, as next friend of Walter Johnson an John B. Johnson, minors, and Franklin K. Lane, Secretary of th

Interior, a judgment was rendered against the said Jennie Johnson, Mary F. Street Jennie B. Wallace and Walter Johnson and John B. Johnson, minors by their next friend, Jennie Johnson, and the said Jennie Johnson, Mary F. Street, Jennie B. Wallace and Walter Johnson and John B. Johnson, minors, by their next friend, Jennie Johnson, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Franklin K. Lane, Secretary of the Interior, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Jennie Johnson, Mary F. Street, Jennie B. Wallace and Walter Johnson and John B. Johnson, minors, by their next friend, Jennie Johnson, shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JENNIE JOHNSON, [SEAL.]
MARY F. STREET, [SEAL.]
JENNIE B. WALLACE AND [SEAL.]
WALTER JOHNSON AND
JOHN B. JOHNSON,
Minors,
By Their Next Friend, JENNIE JOHNSON, [SEAL.]
By CHARLES H. MERILLAT, [SEAL.]
Their Attorney in Fact.

[Seal of U. S. Fidelity & Guaranty Co.]

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By WM. L. SWORMSTEDT,
Attorney in Fact.

Sealed and delivered in presence of—
CHAS. R. HOOFF.
CHAS. R. HOOFF.

Approved by—
WILLIAM R. DAY,
Associate Justice of the Supreme
Court of the United States.

[Endorsed:] No. 3157. The United States of America ex rel. Jennie Johnson et al., Appellants, vs. Franklin K. Lane, Secretary of the Interior. Bond on Writ of Error from Supreme Court U. S. Court of Appeals, District of Columbia. Filed Feb. 3, 1919. Henry W. Hodges, Clerk.

71 UNITED STATES OF AMERICA, *ss:*

To Franklin K. Lane, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days

from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia wherein The United States of America ex rel. Jennie Johnson, Mary F. Street, formerly Mary Fanny Johnson; Jennie B. Wallace, formerly Jennie Bell Johnson, and Jennie Johnson, as next friend of Walter Johnson and John B. Johnson, minors, Appellants, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this first day of February, in the year of our Lord one thousand nine hundred and nineteen.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Service acknowledged this 10th day of February, 1919.
C. EDWARD WRIGHT,
Atty. for Defts. in Error.

[Endorsed:] 3157. Court of Appeals, District of Columbia. Filed Jan. 10, 1919. Henry W. Hodges, Clerk.

72 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 71, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America ex rel. Jennie Johnson, Mary F. Street, formerly Mary Fanny Johnson; Jennie B. Wallace, formerly Jennie Belle Johnson, et al., Appellants, vs. Franklin K. Lane, Secretary of the Interior, No. 3157, October Term, 1918, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 10th day of February, A. D. 1919.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 26,931. District of Columbia Court of Appeals. Term No. 845. The United States of America ex rel. Jennie Johnson et al., plaintiff in error, vs. Franklin K. Lane, Secretary of the Interior. Filed February 11th, 1919. File No. 26,931.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA EX REL. Jennie Johnson et al., plaintiffs in error, *v.* FRANKLIN K. LANE, SECRETARY OF THE Interior. } No. 291.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO SUBSTITUTE AS DEFENDANT IN ERROR JOHN BARTON PAYNE, PRESENT SECRETARY OF THE INTERIOR, IN THE PLACE OF FRANKLIN K. LANE, FORMER SECRETARY THEREOF.

Comes now the Solicitor General, and suggesting to the court the resignation of Franklin K. Lane as Secretary of the Interior and the appointment of John Barton Payne as his successor, respectfully moves the court that said John Barton Payne, in his capacity as Secretary of the Interior, be substituted the defendant in error in this case in the place and stead of said Franklin K. Lane.

This suit was brought to secure a writ of mandamus requiring said Lane, as Secretary of the Interior, to place the names of the relators on the approved rolls of the members or citizens by blood

of the Creek Nation of Indians. The writ of error is brought to review the judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District refusing the writ.

As said Lane was made a party solely in his official capacity as Secretary of the Interior, it would seem that before further proceedings in the case are had there should be a substitution as suggested.

ALEX. C. KING,
Solicitor General.

MARCH, 1920.

Supreme Court, U. S.
FILED
APR 19 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 291.

THE UNITED STATES OF AMERICA EX REL. JENNIE JOHNSON EL AL., PLAINTIFFS IN ERROR,

vs.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR.

BRIEF FOR PLAINTIFFS IN ERROR.

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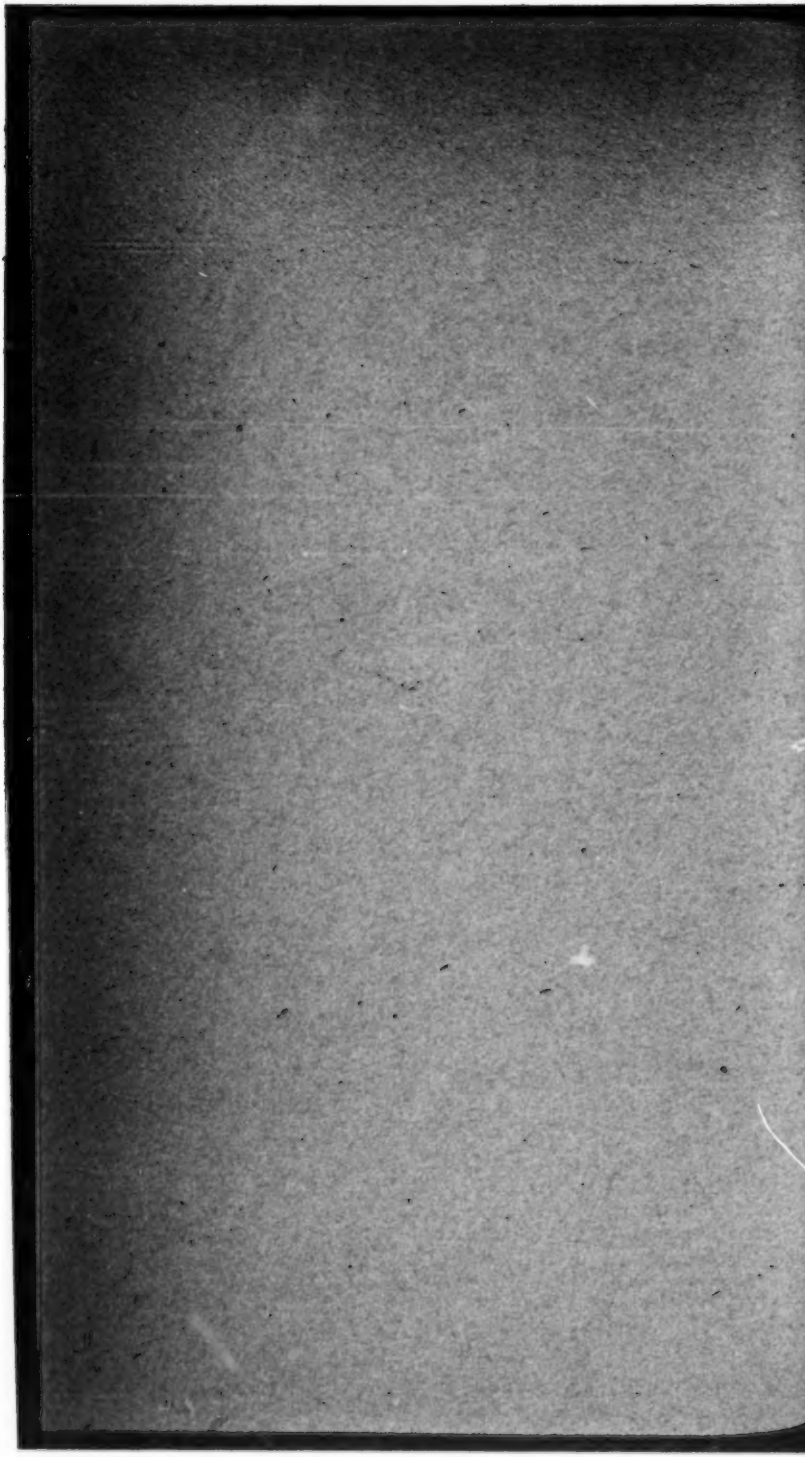

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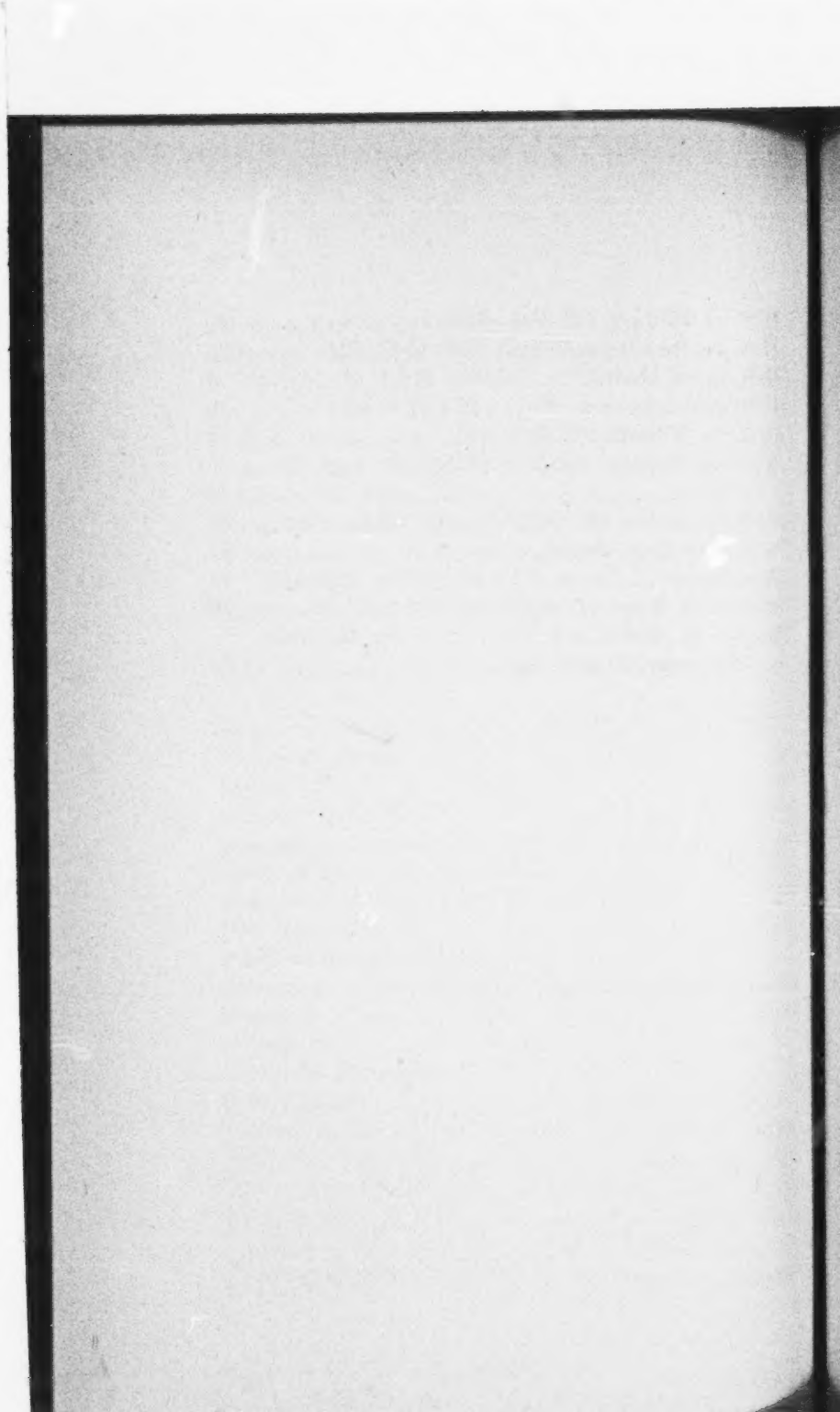

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 291.

THE UNITED STATES OF AMERICA EX REL. JENNIE JOHNSON EL AL., PLAINTIFFS IN ERROR,

vs.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR.

BRIEF FOR PLAINTIFFS IN ERROR.

The plaintiffs in error are Jennie Johnson, a one-eighth Creek Indian by blood, and her children, several of whom are minors, who after being adjudged by the Secretary of the Interior, after a full investigation and hearing, with counsel representing herself and the Creek nation both present, to be entitled to enrolment on the Creek Indian rolls and ordered enrolled as such, had this status,

such as was conferred, taken away summarily from them, without notice or opportunity to be heard, under a blanket order issued by Secretary of the Interior just prior to the closing of the rolls March 4, 1907, that canceled without notice the enrollment and status of about 1,400 persons previously held entitled to citizenship in the Five Tribes and nearly all actually enrolled.

The case comes before this court on a writ of error to the Court of Appeals of the District of Columbia. That court affirmed a judgment of the Supreme Court of the District of Columbia dismissing with costs a petition by plaintiffs in error praying that a writ of mandamus issue against the Secretary of the Interior (p. 2) requiring him to enroll plaintiffs in error and to accord to them the status and rights belonging to blood members of the Creek tribe of Indians and for other and general relief (p. 9). The judgment was entered after testimony taken which disclosed that appellants had been found on the merits of their cases, with notice and hearing given all parties in interest, entitled to enrollment on the blood Creek rolls and ordered enrolled in a formal decision promulgated in the usual manner by the Secretary of the Interior. This decision had been forwarded to the Dawes Commission in the usual way for transmission to plaintiffs in error and with directions to prepare a formal roll for his approval.

The Secretary, however, after such judgment and action, received an opinion from Attorney General Bonaparte in a Choctaw-Chickasaw citizenship case, in no wise related to Creek or Cherokee cases, that caused him or a subordinate to believe he had erred as to some hundreds of citizenship applications in not holding that he was estopped or barred from considering their cases on the merits and enrolling them under the Curtis act of 1898

and the later Creek and other tribal agreements by reason of the fact that they had been denied enrollment under the earlier act of 1896 (which denial was in effect—he hastily concluded, without hearing—res judicata). Accordingly, as the date was almost at hand for closing the rolls, he signed a blanket order prepared by a subordinate, Ivan Pike (rec. pp. 35, 54), reversing all prior procedure and without notice or hearing directing the undoing of all that had been decided or done as to such cases—some 1,400 approximately in number.

Under the opinion of this court in U. S. ex rel. Garfield vs. Goldsby & Allison, 211 U. S., 168-76, the rights so stricken down have been restored by mandamus to all the 1,400, except some score or so in the situation of plaintiffs in error—that is, having favorable decisions but not actual enrollment—on the ground that the Secretary's blanket action without notice was arbitrary, a denial of due process of law and void.

Statement of the Case.

Jennie Johnson, under findings made by the Secretary of the Interior, is a one-eighth Creek blood Indian and the other appellants are her children. Several of the appellants are minors. Jennie Johnson with her children removed from Texas to the Creek nation in the then Indian Territory in 1886 (see finding of Commissioner to the Five Civilized Tribes Bixby (p. 40), and direction to put them on the blood Creek rolls, approved by the Commissioner of Indian Affairs (p. 41), and affirmed by the Secretary of the Interior (p. 42).

Under the Creek tribal laws recognized as valid by the United States it was provided that a person to be a Creek citizen must not only be of Creek blood but must con-

tinue to reside within the Creek nation, inasmuch as its tribal tenure to land was dependent on the tribe continuing to reside on the land conveyed to it. The Creek law provided, however, that where Creeks by blood moved away they might reacquire Creek status by moving back to the Creek nation and obtaining tribal recognition from the Creek National Council, and their rights then continued, if residence continued, as though never separated from the tribe.

In 1890 Jennie Johnson, having moved from Texas to the Creek nation in 1886, an authenticated Creek tribal roll was made up and Jennie Johnson's name was placed on this roll (p. 40), together with the names of those of her children then born. This roll was made pursuant to an act of the Creek National Council approved October 29, 1890 (p. 51), and later was certified to by the principal chief of the Creek nation. From the time of their removal to the Creek nation in 1886 the appellants continuously resided in the Creek nation (p. 40). This, as the Secretary of the Interior and the Dawes Commission have found, was the situation on the merits of Jennie Johnson's rights when Congress first initiated the disintegration of the Five Tribes and entitled them to enrollment.

In 1893 Congress decided the time had arrived to create a new state to be known as Oklahoma, and as a means to that end it reached the conclusion that the communal estates of the Five Civilized Tribes must be divided in severalty among the tribal members. How to do this with justice to all was a problem, for it had come to be recognized the wealth in lands and funds to be divided was enormous and the temptations to wrong stupendous, with many crafty whites, mixed bloods and full

bloods intermingled with a vast population of ignorant and helpless. It appointed a Senate special committee to investigate the subject and that committee, as stated by this court in the *purely constitutional case* of Stephens vs. Cherokee Nation, 174 U. S., 446-52, reported the division could not be safely entrusted to the tribes, saying in a report dated May 7, 1894:

> "If citizenship is left without control or supervision to the absolute determination of the tribal authorities with power to decitizenize at will, the greatest injustice will be perpetrated and many good and law-abiding citizens reduced to beggary."

The state courts in Graffenreid vs. Iowa Land & Trust Co., 95 Pac., 625-28, made this statement:

> "The U. S. Senate Commission to investigate affairs in the Five Civilized Tribes, known as the Dawes Commission, which visited the Indian Territory, in its report to Congress, Senate Mics. Doc. No. 24, Third Session, 53d Congress, said:
>
> 'All the functions of the so-called governments of these five tribes have become powerless to protect the life or property rights of the citizen. The courts of justice have become helpless and paralyzed. * * * Not less regardless have they been of the stipulation in their title that they should hold their territory for common and equal use of all their citizens. Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary.' "

When, in 1895, it became apparent Congress would hesitate no longer and would act, there began in the several tribes exactly what the Senate committee had predicted. In the Creek nation a Committee of Eighteen, known as the Colbert Committee, started to decitizenize a number of those it had for years recognized as tribal citizens and who had improved valuable tracts of land. This Creek committee struck off, or attempted to strike off, the rolls about six hundred names of persons recognized for years as entitled, among them Jennie Johnson's.

In 1896 Congress took the matter of enrollments in hand. The result of its legislation is thus accurately and comprehensively set forth by this court in United States vs. Wildcat, 244 U. S., 115, and inasmuch as plaintiffs in error in their mandamus petition have set forth in *extenso* and *lotidem verbis* (Rec., pp. 4 and 5) the pertinent parts of the several acts of Congress and Creek tribal agreements as to enrollments counsel here incorporate the following from the Wildcat case, *supra*, as embodying more aptly than counsel could do the purport of the statutory enactments:

> "By the Act of Congress of June 10, 1896, 29 Stat., 339, the Commission to the Five Civilized Tribes, more commonly known as the Dawes Commission, was authorized to hear and determine applications for citizenship in any of the Five Civilized Tribes. By that act the rolls of citizenship of those tribes as they then existed were confirmed and the commission commanded in determining applications for citizenship to 'give due force and effect to the rolls, usages, and customs of each of said nations or tribes.' It was provided by the Act of June 7, 1897, 30 Stat., 84, that the term 'rolls of citizenship' should mean 'the last authenticated rolls of each tribe which have been

approved *by the council* (italics ours) of the nation, and the descendants of those appearing on such rolls,' and certain others specified who had been lawfully added to the rolls.

"By the Curtis Act of June 28, 1898, 30 Stat., 495, 502, the commission was authorized and directed to make correct rolls of the citizens by blood of the Creek tribe, eliminating from the tribal rolls such names as might have been placed thereon by fraud or without authority of law, enrolling such only as might have lawful right thereto, and their descendants born since such rolls were made. It was provided that the commission should make such rolls descriptive of the persons thereon, so that they might be identified thereby, and the commission was authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls, with the right of access to all rolls and records of the several tribs, and with authority to administer oaths, examine witnesses, and send for persons and papers. The rolls so made, when approved by the Secretary of the Interior, were to be final, and the persons whose names were found thereon, wtih their descendants thereafter born to them, with such persons as might intermarry according to tribal laws, were alone to constitute the several tribes which they represented.

* * * * * *

"Page 118. This purpose indicated in the Curtis Act of 1898 was emphasized by the so-called Creek Agreement of 1901, subsequently ratified by the tribe. In that act the Commission was authorized to investigate the subject, and its action when approved by the Secretary of the Interior was declared to be final. There was thus constituted a quasi-judicial tribunal whose judgments within the limits of its jurisdiction were

> only subject to attack for fraud or such mistake of law or fact as would justify the holding that its judgments were voidable. Congress by this legislation evidenced an intention to put an end to controversy by providing a tribunal before which those interested could be heard and the rolls authoritatively made up of those who were entitled to participate in the partition of the tribal lands. It was to the interest of all concerned that the beneficiaries of this division should be ascertained. To this end the commission was established and endowed with authority to hear and determine the matter."

Counsel ask attention to the clear repeal or supercession of the 1896 act by the Curtis act and Creek agreements inasmuch as, this being so, the plaintiffs in error, aside from the lack of due process, are entitled to mandamus as cases of clear mistake of plain statutes, the reason for the Secretary's revocation being the denial under the Act of 1896 worked an estoppel to consider under the Curtis act.

The Creek agreement was the first of the tribal agreements to be made. *It provided for no citizenship court outside the Dawes Commission and the Secretary of the Interior, but left citizenship and enrollments wholly to those described.*

An agreement with the Choctaws and Chickasaws was entered into subsequently, namely, on July 1, 1902 (32 Stats., 641). It did, in a measure at least, superimpose another tribunal on the Choctaw-Chickasaw enrollment situation. For while, by Section 30 thereof, final enrollment was left with the Secretary of the Interior by Sections 31 and 32, it created a Choctaw-Chickasaw Citizenship Court in certain classes of Choctaw-Chickasaw citizenship cases and after conferring power of adjudication

on this court and of revision of proceedings under the Act of 1896 declared (Section 33): "The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final."

It was this act and this paragraph thereof only that Attorney General Bonaparte was construing when he gave his opinion which the Secretary of the Interior so ruthlessly, arbitrarily and mistakenly applied throughout the Five Tribes.

Plaintiffs in error first made application for enrollment *as Creeks* when the Act of 1896 was passed, but the Dawes Commission, because of the action of the aforesaid Colbert Committee of Eighteen in 1895, denied them.

After the Curtis Act of 1898 and the Creek agreement of 1901, plaintiffs in error again made application. The Secretary of the Interior had raised before him by the Creek tribal attorney the question whether he could consider any case that had been denied on an application made under the Act of 1896. The Secretary referred the matter to the Assistant Attorney General for his department and following the latter's opinion, held that he could, that the Dawes Commission had exceeded its powers under the Act of 1896, which had confirmed the rolls and merely authorized where persons were entitled but not on rolls additions to be made thereto and had conferred no authority where names were on authenticated tribal rolls such as the last authenticated Creek tribal roll of 1890 on which plaintiffs in error were, to strike names therefrom. The Secretary ruled that he would consider on their merits all applications where parties' names had been on tribal rolls, would as provided in the Curtis Act give due weight to all rolls and all other evidence and adjudicate enrollment according to the very right of the matter unhampered by the claims of estoppel set up by the Creek tribal attorney.

So far as counsel know he first so ruled in the case of Chaney Trent, a Creek by blood, who applied for herself and seven children, claiming under her father, one Richard Atkins, who, during the Civil War, left the Creek nation and went to Missouri, where he remained until 1888, when he and his family returned to the Creek nation, were admitted to Creek citizenship by the Creek National Council and placed on the 1890 roll and thereafter took up and cultivated a farm, continuing to reside in the Creek nation. The case, as seen, was on all fours with that of plaintiffs in error. The Secretary enrolled the Trents, disapproving the finding of the Dawes Commission. See opinion of May 7, 1904, I. T. D. 1424-1902; 2564-1904, which the Court may judicially notice under the authority of New York Indians vs. The U. S., 174 U. S., 1.

The Creek attorney moved for a rehearing and review under the rules, set up fraud in the Creek National Council action in 1890, as provided might be done by the Curtis Act of 1898, and evidence was taken. On December 9, 1904, the Secretary adhered to enrollment of the Trents and approved an opinion by the Assistant Attorney General, which closed as follows:

> "The record strongly suggests that the desire to reap the result of the commendable and useful industry of Chaney Trent and her family, rather than a desire to vindicate the nation's pretended wrong, instigates the opposition to their enrollment." See I. T. D. 6463-04.

This opinion was followed up by another on January 31, 1905, in the Creek case of R. F. Barber. See Bill of Exceptions and Trans. Rec., pp. 36-38. Also by the Creek case of Frank London (Rec. 41), all identical with the cases of plaintiffs in error and all enrolled, attempted on March 4, 1907, to be stricken without notice from

the rolls and restored under the Goldsby and Allison opinions, *supra*.

When Jennie Johnson's application under the Curtis Act of 1898 and the Creek agreements came up on the merits following the foregoing opinions in analogous cases, the Dawes Commission (Rec., 39-41) found she and her children on the merits as to facts and the law were entitled to enrollment and forwarded a decision on September 25, 1906 (Rec., p. 11) granting enrollment (pp. 39-41). On February 15, 1907, the Commissioner of Indian Affairs (pp. 41-2) recommended affirmance, and on February 18, 1907, the Secretary of the Interior affirmed (p. 42) the decision of the Dawes Commission, all with notice and full opportunity to be heard to all parties in interest.

Immediately upon rendition of this decision, the right existed and was well recognized in plaintiffs in error to make "selection" of their allotments of land in severalty, to contest the selections of others, to rent, or lease their selections for a limited period or cultivate and take the crops from the same and if not restricted from alienation to sell or mortgage the selection.

The relative importance of a decision by the Secretary as contrasted with the actual enrollment is thus stated in the annual report of the Dawes Commission dated June 30, 1905 (Bill of Exceptions, p. 53):

> "First, the reception of applications for enrollment.
>
> "Second, the determination of the rights of the applicants.
>
> "Third, the actual placing of the names of these entitled to be enrolled upon the final rolls for approval by the Secretary of the Interior.
>
> "The third is a perfunctory one which consumes little time, accuracy being the most important factor."

And, after March 4, 1907, the Secretary of the Interior himself approved a formal opinion of his Assistant Attorney General, holding that in a contested case the formal favorable decision of the Secretary "in itself constitutes in legal effect an enrollment, and the preparation subsequently of the schedules based thereon is purely ministerial and clerical." This ruling was made long after March 4, 1907, in the case of Serena Bullock and sixteen other persons whose enrollment had been contested but who had not succeeded prior to March 4, 1907, in getting on the formal rolls. Their cases had been entirely overlooked and they neither had been physically enrolled nor had they been included in the list of 1,400 whose rights were ordered stricken down.

After the Goldsby-Allison opinions the Secretary held the plaintiffs in error not being *actually enrolled* did not come within the purview of those opinions and, not being entirely overlooked, did not come within his own, Bullock's, et al., ruling. He reported to Congress the cases of plaintiffs in error as "being of unusual merit," but held himself powerless to act because of this provision in the act approved April 26, 1906 (34 Stats., 137):

> "That the rolls of the tribes affected by this act shall be fully completed on or before the 4th day of March, 1907, and the Secretary of the Interior shall have no jurisdiction *to approve* enrollment of any person after said date." (Italics ours.)

Procedure as to Enrolments.

Up to February 23, 1907, the Secretary of the Interior, the Commissioner of Indian Affairs and the Commission for the Five Civilized Tribes conformed, rather closely,

their work of determining enrollment and allotment rights to procedure in courts and in *quasi judicial* tribunals. The substance of due process of law and equal protection of the laws to all alike was strictly observed.

The rules and regulations approved by the Secretary made provision (p. 52) for the recognition and government before the commission to the five tribes of attorneys and agents representing claimants to citizenship. There was a full right to adduce testimony and be confronted with witnesses, and to cross-examine. The right to be heard, by motion, in interlocutory matters and for rehearings and reviews before all officials, including reconsideration of a final "decision" or the approval by signing of a roll itself by the Secretary himself, passing at successive stages on enrollment cases, was carefully observed. As stated by a witness for the appellee, William H. Angell (p. 50), it was (p. 52), "Prior to February 19, 1907, in all contested Creek enrollment matters the practice to give all interested parties an opportunity to be heard as to their rights by serving proper notice upon them." It also (p. 50) "was the practice of the Dawes Commission to notify interested parties of favorable or unfavorable decisions rendered by the Commission in contested enrollment matters, and similarly to notify them of the decision of the Secretary of the Interior, whether favorable or unfavorable."

Interlocutory orders were made from time to time by either the Dawes Commission or the Commissioner of Indian Affairs or the Secretary of the Interior (p. 43).

The Dawes Commission made investigatons, consulted tribal records, which were made a part, by reference, of decisions and where hearings took place these records showed the time and place of hearing, appearances of attorneys and in other respects, including the

swearing of parties and transcription of testimony, conformed to "a hearing before a master in chancery" (p. 43). The general practice (p. 43) was to have proceedings with an opportunity to the Indian nations to hear and defend against the rights of applicants.

Applicants came before the commission with attorneys where they desired and it was "the uniform practice for the tribal attorneys to be present" (p. 43).

The Dawes Commission when the case was closed rendered "a decision in the form of a judgment for or against the person." "It was not," said this witness (Joseph W. Howell), an old employee in the Assistant Attorney General's office for the Interior Department, having special cognizance on appeal of enrollment cases, "a recommendation, but rather in the form of a judicial decree."

In 90 per cent of the cases there was no contest (pp. 42, 44) and in these cases the Dawes Commission merely prepared the rolls and transmitted the same to Washington for the signature of the Secretary, with such accompanying report, if any, as the commission itself thought proper (p. 44).

Where there was question raised as to the right to enrollment the Dawes Commission did not send up rolls or schedule for approval, but the practice was to transmit the decision of the Dawes Commission to the applicant or his attorney and also to the tribal attorney with notification of the forwarding of the record and decision to the Secretary (p. 43). In some cases the notification was given that the party adversely affected, whether the nation or an applicant for citizenship would have a certain named time within which to act (p. 43), but the work at Washington on appeal was so heavy that practically 30 days or more was allowed, inasmuch as an

interval of 30 days or more elapsed, until the very close of the work, between the Dawes Commission forwarding the record and any case being reached by the Secretary (p. 49) in due course.

Notice and an opportunity to the party to be heard and to fully present his case was always a part of the procedure (p. 47). "The party would not be taken advantage of in any way. The only formality observed in respect to motions for rehearing or reconsideration was the requirement of notice to the other party. It was the regular practice of the Department to require the party who filed a motion to serve it on the other party."

Motions for rehearing or review could be filed at any time prior to the Act of April 26, 1906. This act required such motions to be filed within sixty days of the last prior decision (p. 52), and operated as a rule would have operated in putting a time limit on such motions.

Where any new matter was presented "the commission would be instructed to reinvestigate that point and give the party an opportunity to be heard, if he had not already had it (p. 47)."

The Secretary held that until March 4, 1907, whether a person's name was on a roll or not that he (the Secretary) had a right (p. 44) on his own motion or that of any one else dissatisfied to reopen what had been done. This applied to approved rolls, the same as to cases where a formal decision had been announced but actual rolls had not been prepared and signed. Up to February 19, 1907, all the regulations and practice afforded notice and an opportunity to be heard or to defend.

Upon the receipt of the record in Washington, as was the case before the Dawes Commission, motions and briefs were permitted to be filed freely. The Commis-

sioner of Indian Affairs first examined the record and made report thereon in the form of a recommendation to the Secretary (p. 43). In Washington, "both applicants and the tribe were afforded every reasonable facility to establish their cases," but it was the rule "not to consider any paper unless service was made upon the opposite party."

The Secretary's action after receiving the record and report from the Commissioner of Indian Affairs took the shape of a formal decision that the party was or was not entitled "to enrollment and directed the Dawes Commission to enroll him as a citizen of the nation" (p. 44). It stated where the Dawes Commission decision was upheld that "your decision is hereby affirmed" (p. 43). The Secretary's decision was final in its terms (p. 44), but was regarded as subject to reopening on motion to review or rehearing (p. 44), as were the actual rolls themselves.

Where there was Washington counsel a copy of the Secretary's decision was forwarded to him (p. 49) when signed but the system in general contemplated notice to the parties through the Dawes Commission. Few claimants comparatively had Washington counsel. The Dawes commission mailed the notices to applicants or their attorney where there was not a Washington counsel, after receipt of the decision, favorable or unfavorable, of the Secretary (p. 49). A series of books also was kept in the Department at Washington, just as is kept of public land records, in which were recorded the decisions of the Secretary by press copying the same. It was the settled practice to permit free inspection of these records by the parties or their attorneys (p. 48).

The decision of the Secretary was considered final, subject to the same limitations as were the rolls. The witness Howell testified (44) that he could recall no case in which prior to February 19, 1907, where after the Secretary in a formally signed letter had adjudicated the party entitled to enrolment and had directed preparation of a roll containing the party's name to be signed by him in which the party had not been enrolled or given an opportunity to be heard if any objection arose, and the witness Angell could recall only one case in which this had occurred and he did not set forth what peculiar facts caused this single departure.

The Secretary's decision was regarded, as testified to by Mr. Pike, an old employee (p. 36), as final unless after decision objection or other cause for suspension arose. It was considered "as a judgment in respect to the merits of the case," and the usual procedure was to prepare a roll following the decision being signed and to make everything ready so that all the Secretary "had to do was to affix his signature to the place made for his approval."

The witness Howell testified that the decision was "regarded as final to the extent that I have described before that it would stand unless it was properly set aside"—meaning by properly set aside unless "motion for rehearing and reconsideration were allowed"—after notice and opportunity to oppose it.

The witness Angell testified that the Secretary's decision was considered as establishing the party's right, but he did not regard it as final until the roll was actually stamped and signed, and if actually enrolled, he was liable, for cause and after notice, and hearing to be deprived of his enrolled status at any time prior to March 4, 1907.

He testifies "yes" (p. 53) when asked if after a favorable decision the party ordered enrolled was not accorded the same rights as to selecting an allotment and sharing in tribal funds as a party whose name had been actually inscribed on an approved roll.

As the Secretary's decision was regarded as establishing rights and what remained "perfunctory," as stated in the Dawes Commission's Annual Report for 1905, a party "decided" entitled was permitted prior to physical enrolment to "select" the allotment of land he desired to take out of the Creek tribal domain and to contest the "selection" of an allotment by any other Creek citizen. If he died the lands descended (subject of course to lawful deprivation thereof for cause by elimination from the rolls or a favorable decision prior to March 4, 1907) to his heirs as lands from the date of selection.

If he continued to live under the statutes and decisions the "selection" was the inception of title. The statutes provided from the date of "selection" the lands might be cropped by the party, leased, rented, denuded of timber and, if free from personal restrictions by reason of personal incompetency, sold or willed—subject of course to the Secretary's lawfully revocation of enrolment or decision prior to March 4, 1907.

The Creek agreement of March 8, 1900 (31 Stats., 861) provided:

> "Sec. 37. Creek citizens may rent their allotments, when selected, for a term not exceeding one year, and after receiving title thereto without restriction, if adjoining allottees are not injured thereby. * * *
>
> "Sec. 38. After any citizen has selected his allotment he may dispose of any timber thereon, but if he dispose of such timber, or any part of same, he shall not thereafter select other lands in lieu thereof, and his allotment shall be appraised as if in condition when selected."

The Procedure Under Which Plaintiffs in Error Were Deprived.

On February 19, 1907, Attorney General Bonaparte (24 Opin. A. G., 127) approved an opinion by William R. Harr, one of his subordinates, passing on certain Choctaw and Chickasaw enrollments, the chief of which held that under the Choctaw-Chickasaw agreement of 1902 the decisions of the special Choctaw-Chickasaw citizenship court were final and binding on the Secretary. That opinion (p. 35) did not undertake to pass on Creek enrollments, no hearing was given to any person interested in Creek enrollments and at no time in either the Department of Justice or the Department of the Interior did Jennie Johnson or the other appellants have any opportunity to be heard (p. 35). After this opinion was received an assistant chief in the Indian Territory Division of the Interior Department, Mr. Pike (p. 35), prepared a telegram on February 23, 1907 (p. 53), which Secretary Hitchcock signed directing an inspection of the Choctaw-Chickasaw rolls and that report should be made of names which should be stricken from those rolls as being thereon contrary to the opinion of the Attorney General.

It directed like action should be taken as to Cherokee and Creek rolls, though those nations had no citizenship court created as the Choctaw-Chickasaw agreement of 1902 provided for.

The Dawes Commission under this action made a report pursuant to which nearly fourteen hundred names of persons on the approved rolls were cancelled by Secretary Hitchcock on March 4, 1907, without notice or hearing. These names have been restored under the decisions referred to in the Goldsby and Allison cases.

There were a few cases, comparatively, where the rolls either had been prepared but not signed and stamped approved, or where the clerical and perfunctory work of preparing the rolls had not been performed, following receipt of decisions, prior to receipt of this telegram. The case of plaintiffs in error is in the latter class. It is conceded no hearing, notice or opportunity of defense was accorded plaintiffs in error to assert that their cases did not come within the opinions of the Attorney General, and that such rights as they had under the decision of the Secretary were stricken down pursuant to this blanket telegram of February 23, 1907, and contrary to the settled prior rule, practice and usage of the Department and contrary to plain statutes that as to the Creeks repealed the act of 1896 by the Curtis Act and the Creek agreement of 1901.

Argument.

Counsel believe that the several assignments of error are so interrelated that they may all be argued together. The matter of the Secretary's power with reference to the rolls has been before the courts heretofore and as a result, these propositions may be regarded as settled by this court:

That the Secretary prior to March 4, 1907, had the power at any time, with notice and an adequate opportunity to defend, to cancel and undo his prior acts in approving enrollments, even where the rolls had been stamped and signed by him as finally approved and allotments had reached the stage of issuance of allotment certificates, U. S. ex rel. Lowe vs. Fisher, 223 U. S., 95;

That the Secretary where rolls had been finally ap-

proved by him could not without notice and an opportunity to defend cancel and revoke approval of the rolls, whether allotments had been selected or not, Garfield vs. U. S. ex rel. Goldsby and Allison, 211 U. S., 168-176;

That where, without notice and opportunity given the heirs to defend, the Secretary undertakes to note on the rolls that the party enrolled had died too soon and was not entitled to enrollment or to share in tribal lands and funds such action is "void and of no effect." United States vs. Wildcat, 244 U. S., 115.

The courts have not been heretofore called on to decide the questions, now presented, namely, whether, without notice and an opportunity ot defend, the Secretary could revoke a decision duly approved by him adjudicating a party entitled to enrollment and directing enrollment, and whether this could be done pursuant to a blanket order that was contrary to the prior settled rules, practice and method of procedure and was adopted solely for a certain class of cases.

Assignments of errors 4, 5 and 7 allege error on the part of the court below in holding, in effect, that the decision of the Secretary, affirming a judgment or finding of the Dawes Commission, did not confer rights and was in effect not binding as conferring rights until the roll was approved, that it did not constitute an adjudication of rights and that the decision promulgated could be revoked for new matter or on new issues without giving the party affected notice and an opportunity to be heard.

The record establishes clearly that when the Dawes Commission and the Secretary decided a party was entitled to enrollment that in the Creek nation, the party ordered enrolled was, in advance of actual enrollment,

entitled as of right to select an allotment of land and to contest the right to a particular allotment of any other person and to use the selection in various ways for his profit, as by renting, farming, lumbering and sometimes selling.

Did this constitute a "right" or a "privilege" which, if withdrawable, was withdrawable only according to due process with notice and a hearing? We are not here dealing with a question of revocation, *but of revocation without notice and an opportunity to be heard.*

Counsel believe maintainable the proposition that where valuable rights are involved due process requires "lawful procedure" and notice even before rights of any kind vested, contingent or inchoate, have come into inception, but they do not have to go so far in the instant case. The learned court below expressed the opinion that all plaintiffs in error had was a "declaration" in their favor and that no "right" or "privilege" had accrued with the Secretary's decision. Is it correct under the record? Is a strictly vested right necessary to the case?

"Privilege" is defined as some peculiar benefit, right, immunity, or advantage, enjoyed by an individual and not enjoyed by the world at large.

> Lawyers Tax Cases, 55 Tenn., 505-649.
> Lonas vs. State, 50 Tenn., 287-306.
> Ripley vs. Knight, 123 Mass., 515-19.
> Moore vs. Fletcher, 16 Me., 63-5.
> Guthrie vs. Cameron, 41 Pac., 635-9.

An inchoate right of dower will give a right to relieve a cloud. Madigan vs. Welsh, 22 Wis., 501-4.

By the "decision" of the Secretary plaintiffs in error had acquired a privilege of selection and an advantage

not enjoyed by the world at large—and the fact that it was an interest contingent on not being constitutionally deprived prior to March 4, 1907, did not make it the less so.

Hooks vs. Kennard, 114 Pac., 744.

> "The selection of and the filing upon an allotment of land is the inception of the title of the Indian allottee or his heirs, and when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title, citing DeGraffenreid vs. Iowa L. & T. Co., 95 Pac., 624; Godfrey vs. Iowa L. & T. Co., 95 Pac., 792; Irving vs. Diamond, 100 Pac., 557. If we apply that principle to the case at bar, the title to the allotments of the three Creek allottees whose estates are involved herein passed to and became vested in their heirs at the date said allotments were segregated and allotted in their names."

After restrictions were removed, or if the Indian or freedman or intermarried white were not subject to resitrictions, the land was alienable from the moment of selection.

Simmons vs. Whittington, 112 Pac., 1018.

Of course, while the Indian's rights was still a "float" merely—that is, a right to make a "selection"—it was not alienable, for the land had not been segregated and the policy of the law was opposed the sale prior to selection (Choate vs. Trapp, 224 U. S.), though the party could, of course, and usually did, enter on the land first and file his selection with the Dawes Commission afterwards and usually filed on land that for years had been his home.

In McWilliams Investment Co. vs. Livingston, 98 Pac., 914, the Oklahoma Supreme Court said:

"It is contended that he, Bristor, who conveyed to Livingston, was not an allottee prior to the issuance and delivery to him of the deed to the land, and that prior to that time he had no power to convey the same. With this contention we cannot agree.

"In some of the treaties with the other tribes it is provided that the Commission of the Five Civilized Tribes should issue to the citizens, after they had selected their allotments, certificates, which should be evidence of the right of the allottee to the land. We do not find any such provision to have been made in the agreement or laws between the United States and the Creek nation, but that it was clearly contemplated that a certificate evidencing an allotment right should be issued is made manifest by the first paragraph of section 25. We are not advised as to the practice obtaining in reference to these certificates, whether in fact any were issued or not, nor do we regard this as very material or controlling in the case, for in our judgment the date of the right to alienate or transfer on the part of the allottee, subsequent to April 21, 1904 (the date of the first act partially removing restrictions on alienation) related solely to the time when such allottee actually made or *selected* his allotment, and when he had done the things necessary to secure an equitable interest or title therein, entitling him to the patent."

If a person declared entitled on contest had *selected* an allotment and then died, his widow would be entitled to dower therein, and until it was assigned to her was entitled to possess the home of her late husband and the appurtenant farm free of rent, even though the list or roll containing his name had not been formally approved and signed by the Secretary, but only a decision in his

favor on contest existed on the part of the Secretary and the widow consequently might lose her widow's rights or dowable interest by the Secretary lawfully—meaning thereby with notice and an opportunity to be heard—undoing his "decision" and declining to approve a roll containing the name.

The court below in a labored endeavor to free the case from its appellate aspect when before the Secretary, and from its aspect of a promulgated affirmance by the Secretary of the Interior of a judgment by a quasi-judicial tribunal of the first instance, has attempted to belittle the functions of the Dawes Commission. It is true the Commission by 1905 had been reduced from five to four and from four commissioners to one commissioner, and that Congress in an endeavor to get the rolls closed made the Commissioner less independent of the Secretary, but a sound view of the statutes and the actual operation under them does not vary or alter the effect of the enrollment decisions, originally or on appeal, or make it of the least importance in this case whether plaintiffs in error's status was passed on prior or subsequent to 1905.

The Indian Appropriation Act, approved April 21, 1904 (33 Stat., 189), provided:

> "For salaries of four commissioners appointed under acts of Congress approved March 3, 1893, and March 2, 1895, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars, and said Commission shall conclude its work and terminate on or before the first day of July, 1905, and said Commission shall cease to exist on July 1, 1905; provided, that said Commission shall exercise all the powers heretofore conferred upon it by Congress."

The Indian Appropriation Act, approved March 3, 1905 (33 Stats., 1048-59), provided:

> "For the completion of the work heretofore required by law to be done by the Commission to the Five Civilized Tribes, and the provisions for investigations herein contained two hundred thousand dollars. Said appropriation to be disbursed under the direction of the Secretary of the Interior: *Provided*, That the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."

That the foregoing was not intended, however, to abolish, as stated by the court below, is apparent from further provisions in this act and in later acts relating to the Dawes Commission.

The Act just quoted provided that the Commission to the Five Civilized Tribes was authorized to consider applications made within 60 days for enrollments of children born prior to March 4, 1905, to enroll citizens of the tribes and "to enroll and make allotments to such children," indicating plainly its clear purpose was merely to give the Secretary of the Interior somewhat more control. In practice, as the record in the instant case shows, there was no change whatsoever in the manner of performing the work of Five Civilized Tribes enrollments.

The Indian Appropriation Act, approved June 21, 1906 (34 Stat., 340), provided:

For the completion of the work heretofore required by law to be done by the Commission to the Five Civilized Tribes, two hundred thousand dollars. Said ap-

propriation to be disbursed under the direction of the Secretary of the Interior. That the Commissioner to the Five Civilized Tribes is hereby authorized to add the names of the following persons to the final roll of the citizens by blood of the Choctaw tribe * * * Provided, That the enrollment of said persons by the Commissioner to the Five Civilized Tribes shall not be objected to by the said tribes, and shall be approved by the Secretary of the Interior.

If the purpose of the opinion of the court below was to liken by analogy the case to one where an administrative official receives a recommendation from a subordinate and first approves it and then changes his mind, it is submitted a closer analogy would be to an equity proceeding referred to a master in chancery, a report and finding by the master in chancery with right of appeal to the chancellor, a publicly announced and signed approval of the report of the master by the chancellor after opportunity to be heard afforded all parties, the incipiency immediately thereupon of valuable rights and privileges, and the later blanket revocation of all that had been done, without notice or hearing, in this and 1,400 other cases in consequence of an opinion in a clearly distinguishable class of cases by an advisory law official. In those states where the practice is for the judgment roll or record to be prepared by others following decisions and then evidenced as to its correctness by the signature of the judge, the analogy would be even closer if this matter were added to make complete analogy to judicial procedure.

UNDER SUCH CONDITIONS HAS THERE BEEN DUE PROCESS OF LAW AND HAS A PARTY HAD THE EQUAL PROTECTION OF THE LAWS WHERE THE PRIOR DECISION HAS BEEN REVOKED AND SUCH RIGHTS AS THE DECISION CONFERRED HAVE BEEN

TAKEN AWAY WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD? OR HAS THERE BEEN AN ARBITRARY AND ILLEGAL EXERCISE OF POWER WHICH THE COURTS IN A PROPER CASE WILL REDRESS?

In Garfield vs. Goldsby, *supra*, the Supreme Court said:

> "As has been affirmed by this court in former decisions there is no place in our constitutional system for the exercise of arbitrary power. It has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard. The right to be heard before property is taken *OR RIGHTS OR PRIVILEGES WITHDRAWN* which have been previously legally awarded is of the essence of due process of law."

In Interstate Commerce Commission vs. L. & N. R. R. Co., 227 U. S., 88, this court said:

> "That administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence,' or if the facts found do not as a matter of law, support the order made."

That this right to notice and a hearing applies not only to the right to adduce evidence but to the right to be heard on the law, to have notice of any issues on which rights may be said to depend, and to defend against an attempted application to one case of the facts and law of other cases is, counsel submits, a constitutional privilege. A party is entitled to have, as of right, a procedure

adopted that will not conclusively presume either the facts or the law against him. He has a right to the settled procedure previously deemed essential to a just determination of the merits of controversy and to protection against deprivation of a previously acquired status by means of new special action applied by court of administrative officer.

In Iowa Central Railway Company vs. Iowa, 160 U. S., 389, it said:

> "It is clear that the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, *provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided.*"

In Simon vs. Craft, 182 U. S., 427, it said:

> "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed by the substance of things and not by mere form. * * * The due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, *but only that there shall be a regular course of proceedings in which notice is given of the claim asserted and an opportunitity afforded to defend against it.*"
>
> See Twining vs. New Jersey, 211 U. S., 78.
>
> Londoner vs. Denver, 210 U. S., 373 (a tax case, due process being at its lowest point in matters of taxation).

The decisions of the state courts are to the same purport.

Wulzen vs. Board of Supervisors, 101 California, 15.

"The term due process of law, in its broad sense, signifies such an exercise of the powers of the government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe. * * * Whenever an act determines a question of right or obligation or of property as the foundation upon which it proceeds such an act is to that extent judicial (p. 20). Administrative process it has been said of the *customary* sort is as much due process of law as judicial process. To settle the question as applied to a given state of facts we have but to examine the previous condition of things in use and regarded as essential to the protection of the rights of the individual under such circumstances, and if in substantial compliance with such essentials, the course prescribed may be said to be in consonance with the law of the land and to constitute due process of law."

In the instant case whether the matter of enrollment be regarded as administrative of quasi judicial what was done subsequent to February 23, 1907, was not of the customary sort; it did not protect the rights of the individual; it did not afford notice and an opportunity to be heard on the new issue or alleged issue presented; it was not in consonance with the previous rules, practice and usage; it was the application of a mere blanket imperial ukase enacted for the special occasion, and a departure from all that had been held essential theretofore—a procedure out of a place in a republican form of government.

In the matter of Hatch, 2 Jones and Spencer (N. Y., 89).

Due process means a suit instituted and conducted in accordance with the prescribed course of procedure.

Zeigler vs. South and North Alabama Railroad Company, 58 Ala., 594.

An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business without any wrong, fault or neglect on its part, when under the general law of the land no one else is so liable under such circumstances does not provide due process of law and is therefore void.

Dreyfus vs. City of Montgomery, 58 Southern, 731.

"The laws must operate on all alike and not subject the individual to an arbitrary exercise of the powers of government to constitute due process."

Davis vs. Florida Power Company, 64 Fla., 247.

"No person or class can be singled out as a special subject for arbitrary and unjust discrimination and hostile legislation"—

a fortiori not to be singled out in a special blanket telegram and later special discrimination.

Wynehamer vs. People, 2 Parker's Crim. Rep., 421.

"The terms law of the land and due process of law in all cases require a judicial investigation not to be governed by a law specially enacted to take away and destroy existing rights but confined to the question whether under the pre-existing rule of conduct the right in controversy has been lawfully acquired and is lawfully possessed."

In the instant case appellants under previous orderly procedure acquired rights that left what remained, in the language of the Commission in one of its annual reports, "perfunctory," notwithstanding that with notice and opportunity for defense those rights could be taken away whether the matter had gone to the length of perfection of the perfunctory matters or not.

Wright vs. Cradlebaugh, 3 Nev., 310.

Due process requires that the party shall be properly brought into court and when there shall have a right to set up any lawful defense to any proceeding against him. The legislature under pretense of regulating pleading cannot deprive a party of plain rights.

In James vs. Germania Iron Co., 107 Fed., 597, the court held specifically that the Secretary of the Interior could not by new rules or new special action taken subsequent to a party's acquisition of rights deprive the party of that to which he had become entitled under existing procedure.

That the matter had not gone to the point of an approval of the rolls, it is submitted, does not change the rule. That at such stage less formality of procedure may have sufficed than where the rolls had been actually approved may be conceded arguendo, for here there was no notice whatsoever. The decision placed in the public files was a determination as much final in its nature as was the stamping and approval of the rolls; either was subject to reopening, but reopening with notice. The land rights were the same, namely, to select an allotment and retain the selection provided that before March 4, 1907, the enrollment rights previously adjudicated were not taken away and held to have been improperly determined, and meanwhile to rent or crop the allotment and to cut its timber and extract its minerals.

In Orchard vs. Alexander, 157 U. S., 381-83, the court said:

> "Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in Cornelius vs. Kessel, 128 U. S., 456, not arbitrary and unlimited. It does not prevent judicial inquiry. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he can not be arbitrarily dispossessed."
>
> See U. S. vs. Detroit Lumber Co., 200 U. S., 321.
>
> Knapp vs. Alexander, 237 U. S.

THE SECRETARY'S ACTION IN STRIKING DOWN THE RIGHT OF ENROLLMENT OF PLAINTIFFS IN ERROR WHICH HE HAD DECIDED AND DIRECTED, BEING WITHOUT NOTICE AND BY AN ARBITRARY BLANKET ORDER, WAS A NULLITY. THE ONLY LAWFUL PROCEEDINGS PRIOR TO MARCH 4, 1907, BEING AN APPROVAL OF ENROLLMENT OF PLAINTIFFS IN ERROR THEY ARE ENTITLED TO MANDAMUS TO GIVE FORCE AND EFFECT TO THE ONLY LAWFUL PROCEEDINGS.

The court below in its opinion (p. 59) states that no right was given by affirmance by the Secretary of Commissioner Bixby's decision; that it was "nothing more than a declaration that the appellants (plaintiffs in error) were entitled to be enrolled," and conferred no right or privilege and until actual enrollment the Secretary's discretion was absolute—to be exercised as he chose in effect uncontrolled and uncontrollable by the courts.

We have seen by the record that the "decision" in contested enrollment cases was regarded by the Secretary and his subordinates as the substance and the physical preparation, stamping and signature of the rolls as but the completed evidence of the Secretary's approval of their enrollment. Otherwise they would not have been by the Secretary permitted to "select" their allotments upon his "decision" and to have the valuable equitable rights that went with "selection"; to contest selections of others, to use the allotment for their profit, a right or privilege denied to all but tribal citizens by the statutes and even to make sales of their equitable rights, their selections, if not restricted incompetent Indians. Signing and stamping were regarded as almost "rubber stamp" procedure.

The fact that Jennie Johnson and her children had or had not made their selections before March 4, 1907, cannot alter their right so to do on the day of the Secretary's decision. All the evidence concedes they had such a right given them by the Secretary. In many cases many months elapsed between formal favorable decisions and actual enrollment.

The Secretary prior to this mandamus proceeding himself took the very view for which plaintiffs in error contend and rejected the narrow view advanced by the learned Court of Appeals.

Serena Bullock and sixteen other persons whose enrollment had been contested, on one ground or another, failed to get on the rolls before March 4, 1907, through clear inadvertence. Decisions had been rendered by the Secretary in their favor, but their cases were entirely overlooked and it was not decided whether or not the blanket order of February 23, 1907, should be applied to them.

After March 4, 1907, the oversight was discovered and the question arose whether they had or had not the

right to be treated as though they were on approved rolls. The Commissioner to the Five Tribes held the decision was tantamount to enrollment. The Commissioner of Indian Affairs held to the narrow view that as the rolls had not been approved before March 4, 1907, and the rolls were closed, they had no rights.

The Act of April 26, 1906 (34 Stats., 137), section 2, provides:

> "That the rolls of the tribes affected by this act shall be fully completed on or before the 4th day of March, 1907, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any persons after said date."

The Secretary of the Interior and Assistant Attorney General Woodruff, in a formal letter, held:

> "Commissioner Bixby held the view that the decision of the Secretary in favor of these persons *amounted in legal effect to the approval of their enrollment,* and that accordingly the roll schedules transmitted by him (Note: after March 4, 1907) should be regarded as part of the final rolls of the Creek and Cherokee nations. The Acting Commissioner of Indian Affairs reporting in the matter June 18, 1907, expressed the opinion that the law requires the rolls of Creek and Cherokee citizens to be approved by the Secretary of the Interior.
>
> "The Department concurs in the opinion of Mr. Bixby. The rights of these applications have been fully established by formal decisions rendered by the Secretary of the Interior. There is no reason why their enrollment should be denied under existing law, except a seeming defect in *the purely clerical matter of making up the final lists or roll schedules.* * * *

> "It was the authorized custom when a decision was rendered against an applicant, or when a protest was made against his allotment by the attorneys for the nation in interest to forward the completed record to the Secretary for examination, together with the formal decision of the Commission, which contained, by the way, a list of the applicants in the case. The Secretary's action upon the matter was taken in the form of a decision whereby he either affirmed the decision of the Commission or directed it to enroll the applicants. * * *
>
> "The sounder view is that the Secretary's favorable decision in itself constitutes in legal effect an enrollment, and that the preparation subsequently of the schedules based thereon is purely ministerial and clerical. * * * There are other reasons which need not be enumerated why it would be inconsistent to hold that the enrollment or cancellation of names does not result in legal contemplation from the Secretary's decision, unless followed by his notation to the same effect upon same list or schedule."

If this view be correct and we submit it is then there necessarily is no force in the argument advanced by the court below that "if we should now grant the application of the appellant to direct the Secretary to place their names upon the rolls and approve their enrollment we would require him to do that which under the Act of Congress he has no power to do." For, plaintiffs in error predicate their contention on the proposition that the Secretary's decision prior to March 4, 1907, did "approve their enrollment" and that the revocation proceedings being a nullity by reason of want of notice and the arbitrary blanket order they are in exactly the same position as Serena Bullocks and others (who if neces-

sary could have sued in mandamus) whose cases had been wholly overlooked after decisions by the Secretary in their favor and that they being free from fraud and so found necessarily by the Secretary have the right to the writ they seek. The fact March 4, 1907, has passed is no impairment of the judicial power.

The Court below in answer to citation by counsel of land office cases almost identical with the instant case dismissed these authorities with the statement there was no analogy since the public land claimants had paid money at the local land office and made proofs. We submit that the residence of plaintiffs in error among the Creeks, their recognition by the tribal authorities and their proofs before the Dawes Commission answers the same as the cash payment of public land claimants. The latter claimed under purchase, the Indian applicants as coparceners. Each had initiated claims and rights lawfully and cannot be dismissed as strangers or intruders. The land cases cited were:

Risdon vs. Davenport, 57 N. W., 432.

A public land case. The case in court turned on the question whether there should be recognized as valid action of the Commissioner of the General Land Office and the local land officer in canceling an entry made by one Conway. It appeared one Conway had made land entry and received a duplicate receipt from the register and receiver of the local land office. Later the land was mortgaged to Davenport, the law permitting this in advance of patent, just as in the five Tribes the law permits, as shown by the adjudicated cases sales after "selection" where no restrictions on alienation for personal reasons exist). Risdon subsequently filed contest procedings alleging the Conway entry was fraudulent. Conway was

not personally served with notice of the contest proceedings, but only by publication, and Conway never actually appeared in the proceedings. Service by publication under the Land Office rules could be made, but only where by affidavit of the contestant (Risdon) it appeared that personal service could not be made. No such affidavit was made.

The court held that "such a rule (as to service) is reasonable and right, and a contrary rule or practice would be unreasonable and wrong; that Conway was entitled to notice and the result of the pleaded facts was that it appeared the land official had cancelled the Conway entry without notice and an opportunity to be heard. The cancellation it therefore held was void, as being made without due process of law; that "neither the register and receiver nor the Commissioner of the General Land Office could arbitrarily or voluntarily cancel Conway's entry," and *that the only lawful proceedings that had been had having been those whereby Conway had obtained a certificate*, it must be held he was entitled to a patent and that therefore the patent that had been issued to Risdon after cancellation of Conway's entry was void and conveyed no interest to Risdon, since patent could not issue to a second party where a first party *was entitled under the only proceedings that had been judicially had.*

Delles vs. Second National Bank, 75 Amn. St. Reports, 875.

The power of the land department to cancel a public land entry for fraud can be exercised only after notice to and a hearing of the interested parties. Cancellation of such entry without a hearing is a nullity. * * * (p. 879). In Caldwell vs. Bush this court held that

after a hearing of which the entryman had notice, the land department of the government could cancel an entry for fraud, but that in such case a hearing and notice were necessary. Such is the law announced by the Supreme Court of the United States, Orchard vs. Alexander, 157 U. S., 372. * * * The necessity for a hearing is also recognized by the Secretary of the Interior.

Held, that the cancellation being a nullity, the right to the land was in the party whose entry had been cancelled.

See notes to this case following report of the decision and also Lewis vs. Shaw, 57 Fed., 516.

A right to a patent is equivalent to a patent issued, and similarly a right to enrollment by analogy is equivalent to an actual enrollment. Wallowa National Bank vs. Riley, 54 Amn. St., 795; Stark vs. Starr, 6 Wall., 402; Cornelius vs. Kessel, 128 U. S., 456.

Fayerweather vs. Ritch, 88 Fed., 713, a non-public land case, illustrates the principle.

This suit involved the right of plaintiffs to reach certain assets alleged to be in defendants' hands as executors or trustees. A demurrer was filed. The point involved in the federal court was whether a decision of a state court was *res adjudicata*. This in turn depended on whether proceedings that constituted "due process of law" had been had in the state court as to certain releases alleged to have been fraudulently obtained.

It was alleged in the bill (p. 715) that the state court had not "passed upon or included in judgment the said issues" as to the releases.

The federal court held it could not pass upon errors or irregularities in the state court, but only (p. 718) "whether the issues raised in this case were tried there,

or perhaps whether the proceedings there afforded opportunity, by due process of law, for the trial of the issues, if a trial was had."

The court found the proceedings as they had gone forward in the state courts had not given an opportunity for trial of an issue as to fraud in the releases and therefore the state court proceedings were short of due process of law and not entitled to credit.

The blanket order being a nullity and void because issued without notice and a hearing to defend (it was void and a nullity as to Goldsby and 1,300 others and under the Department's own rules and practice was equally so as to those having only "decisions" in their favor since the settled practice for reconsideration was by review or hearing with notice or charges made and notice to parties in interest), it follows the situation is as though such order has no existence *being null and void*.

For the court to consider and heed the blanket order, notwithstanding a failure to observe due process of law by the Secretary, would be for the court to deny "due process"; for the court to say that it would not put the blanket order out of the case and yet would deny an enrollable status and mandamus because the roll had not been approved, would be to deny appellants a day in court.

From still another angle the same result is reached. The record establishes that Jennie Johnson acquired the rights resultant from a favorable decision of the Secretary under rules and practice which provided for motions for review or hearing by the adversary party or proceedings *sua sponte* by the Secretary, but with notice and an opportunity to defend in any and all events given

the party to be affected. The Secretary could not revoke the established rules and practice and deny opportunity to meet the new proceedings.

James vs. Germania Iron Co., 107 Fed., 597.

In this case a contest had arisen over some public lands containing minerals between a scrip entryman and a pre-emptor. The Secretary of the Interior by final decision on February 18, 1889, declared both parties' entries void as fraudulent and the land subject to disposal under the public land laws.

The local land officers at Duluth were first officially informed of the decision on February 22, 1889, a holiday, and on February 23 promptly cancelled the entry on their books.

A crowd had gathered. The first one in was one Hartman, to whose rights, if any, the Germania Iron Company succeeded. However, immediately after the Secretary's formal decision of February 18, 1889, and again on February 19, 1889, James made homestead entry of the land, but his entry was rejected on the ground that it was covered by the scrip, no action having been yet taken under the decision at Washington.

Subsequently the Secretary upheld the James entry and issued him a patent.

The court found that at the time of the James entry there were rules, practice and a line of decisions under which a local land office could not receive an entry until after official notice has been received of the final decision of a land contest and an appropriate entry had been made on its books. It also found that, *after the James entry,* this practice had been changed by order of the Secretary.

The court held that the Secretary could not by a new rule alter the status and rights of the parties as they stood on February 23, 1889, at the time of the Hartman entry, and that the award of the land to James was a flagrant violation of the rules and practice as it existed when the Hartman entry was made. The court said:

> "Nothing short of an express and formal repeal or abrogation of the rule and public notice thereof by the Secretary, who alone had the power to establish and overthrow rules, could have destroyed its force or limited its terms. It may well be for obvious reasons that a failure of the local land officers after receipt of the decision to perform the clerical act of cancelling the prior entry on their plats and records promptly in the ordinary course of business would not continue the withdrawal of the land from entry, but this question is not presented in the case before us. * * * Hartman had the right to rely upon this rule and practice, and to secure this land in accordance with it; and the allowance by the Secretary, in flagrant violation of it, of James' entry upon an application made before the decision cancelling the prior entry was officially communicated to the local land officers, was a clear error of law."

PLAINTIFFS IN ERROR ARE ENTITLED TO MANDAMUS BY REASON OF A CLEAR ERROR OF LAW OF THE SECRETARY IN HASTILY HOLDING THAT IN THE CREEK NATION APPLICANTS ON THE CREEK ROLLS WERE ESTOPPED IF DENIED UNDER THE ACT OF 1896 TO APPLY UNDER THE CURTIS ACT OF 1898 AND THE LATER CREEK. THE CURTIS ACT PLAINLY SUPERSEDED THE EARLIER ACT AND OPENED UP ENROLLMENTS DE NOVO.

That this is so is the obvious reading of the decision of this court in U. S. vs. Wildcat, *supra*. But as it may

be argued this question was not under critical examination in that case, counsel, for the convenience of the court, have attached hereto as an appendix the statutes in question. They make it plain we believe that the later acts were supercessory as to Creeks. The Secretary's attempted revocation was on the ground that refusal to enroll under the Act of 1896 barred consideration on the merits. The pleadings concede this was the "sole and only reason" (p. 14). The later acts obviously opened up enrollments and did not mean there was an estoppel to consider cases on the merits because under the Act of 1896 application had been made to enroll petitioners and had been rejected. Mandamus lies where there is a clear error of law (Roberts vs. The U. S., 176 U. S., 221).

One of the chief purposes of mandamus is for the courts to correct abuses where there has been an arbitrary act or procedure by an administrative officer that results in a failure of equal administration of equal laws, rules or practice.

U. S. vs. Billings, 190 Fed., 363.
Davidson vs. New Orleans, 96 U. S., 397.
Sheldon vs. Hayne, 261 Ill., 225.
Dental Examiners vs. People, 123 Ill., 241.

The Equities Are With Appellants.

The cases of appellants are equally free from objection based on any proposition of fraud in enrollment or of a mere technical legal right, as to which mandamus may be refused because of the discretionary nature of the writ. No denial is made that appellants are of Creek blood or that they removed to the Creek nation long prior to the first proposed division of the tribal estate, or that the

Creek National Council before there was any inducement to improper acts on the part of either applicants or the nation in 1890 recognized them as Creek citizens and entitled by birth and resumption of residence to Creek citizenship. In all the enrollment legislation of Congress these three elements were conceded to establish rights, namely, blood, residence and recognition. All three have been found to exist by the Secretary in the exercise of a jurisdiction vested in him and when he was pursuing in a lawful, constitutional way the jurisdiction vested in him.

Likewise no question of laches can properly arise. The appellants are Indians and most of them minors, and as to the latter there is of course and can be no question of laches, and as to those who are adults the authorities are to the effect that the doctrine of laches does not apply to Indians. They steadfastly pursued their claims before the Secretary from an early day and then, after the Secretary had finally decided that he could not grant relief but recommended them to Congress, they looked for relief from legislation, but, not obtaining it, have asserted their rights in the courts, the legislature having too many other matters before it to pass on their claims one way or the other, although the Secretary reported their cases as being of unusual merit.

Respectfully submitted,

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APPENDIX.

Act of June 10, 1896 (29 Stat. L., 321).

That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after said hearing they shall determine the right of said applicant to be so admitted and enrolled: *Provided, however,* That such application shall be made to such commissioners within three months after the passage of this act. The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: *And provided further,* That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions

and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided,* That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however,* That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs. And said Commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area,

amount, and value of the property leased and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of the members of said tribes and others.

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof.

That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided,* That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the

act of June tenth, eighteen hundred and ninety-six, herein construed, may be stricken therefrom by such Commission where the party affected shall have ten day previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided also,* That anyone whose name shall be stricken from the rolls by such Commission shall have the right of appeal, as provided in the Act of June tenth, eighteen hundred and ninety-six.

this Act of June 28, 1898 30 Stat 495

Sec. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Courts of Claims re

dered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw nation concludes September twenty-seventh, eighteen hundred and thirty, and to that end may administer oaths, examine witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek nation.

It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw nation, and all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made

in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however,* That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to de-

liver same to said commission, and on their refusal or failure to do so to punish them as for contempt, as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The members of said commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall willfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense.

Rolls of Citizenship.

SEC. 28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no persons whomsoever shall be added to said rolls after the ratification of this agreement.

All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled

under section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.

29. Said Commission shall have authority to enroll as Creek citizens certain full-blood Creek Indians now residing in the Cherokee Nation, and also certain full-blood Creek Indians now residing in the Creek Nation, who have recently removed there from the State of Texas, and families of full-blood Creeks who now reside in Texas, and such other recognized citizens found on the Creek rolls as might, by reason of nonresidence, be excluded from enrollment by section twenty-one of said act of Congress approved June twenty-eight, eighteen hundred and ninety-eight: *Provided*, That such nonresidents shall, in good faith, remove to the Creek Nation before said Commission shall complete the rolls of Creek citizens as aforesaid.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES OF AMERICA *ex rel.* JENNIE JOHNSON *et al.*, *Plaintiffs in error*, *v.* JOHN BARTON PAYNE, *Secretary of the Interior*. } No. 291.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The plaintiffs in error filed in the Supreme Court of the District of Columbia a petition for a mandamus directed to the Secretary of the Interior to compel him to place their names on the approved rolls of the Creek Nation and to accord them the status and rights belonging to blood members on the approved rolls of the Creek Nation of Indians.

Under the provisions of the act of March 3, 1905, 33 Stat. 1048, 1060, there devolved upon the Secretary of the Interior the completion of the unfinished business of the Commission to the Five Civilized Tribes, known as the Dawes Commission, one of whose

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assert that they are entitled to enrollment under the law.

The Secretary of the Interior, in his answer to the petition and the rule to show cause, denied that the petitioners, the plaintiffs in error here, were blood members of the Creek tribe, or at all members of that tribe, and asserted on the contrary that their names were never placed upon an approved roll of citizens of the Creek tribe of Indians, and were not upon any such roll approved by the Secretary of the Interior prior to March 4, 1907. The answer then set forth the history of the attempts of the Johnsons to procure enrollment, as heretofore described, and asserted that his action on the application for enrollment was within his discretion, and further that in view of the provisions of the act of April 26, 1906, *supra*, he was without jurisdiction to approve enrollments after March 4, 1907.

The Supreme Court of the District of Columbia overruled a demurrer interposed by the petitioners (the plaintiffs in error here) to the answer, and issue having been joined and testimony taken, dismissed the petition. R. 31; Opinion, R. 30, 31.

In overruling the demurrer which challenged the answer as bad in substance, the Supreme Court of the District of Columbia held that as the question whether the Johnsons were entitled to enrollment was one involving the exercise of discretion and judgment by the Secretary of the Interior, it was not open to review by the court in a mandamus proceeding; that as their names were not upon the ap-

proved rolls, it was within the power of the Secretary to countermand his decision without notice and to decline to put them on the roll, and that the placing of names on the roll and approving the roll were more than mere ministerial acts. Opinion, R. 18–29.

Upon appeal, the Court of Appeals affirmed the judgment, holding that the courts could not grant the writ of mandamus to compel the Secretary to do what had been forbidden by said act of April 26, 1906, and further that no rights had accrued to the Johnsons by reason of the Secretary's affirmance of Bixby's first "decision" favorable to them; on the contrary, that no rights were vested until a name was entered on the rolls and the same were approved by the Secretary. It further held that in revoking his approval of Bixby's favorable recommendation, the Secretary exercised official discretion which could not be controlled by the courts. R. 57–60.

ARGUMENT.

I.

The Writ of Error should be dismissed for want of jurisdiction.

The plaintiffs in error base their writ of error on paragraphs 3 and 5 of section 250 of the Judicial Code.

The paragraphs are as follows:

> Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, or the validity or

construction of any treaty made under its authority.

Fifth. In cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question.

The only possible basis for the writ of error under the third paragraph would be the assertion of plaintiffs in error that they were denied due process of law because the Secretary of the Interior reversed his decision in favor of their enrollment without giving them an opportunity to be heard before so doing.

But the plaintiffs in error had been afforded an opportunity to present evidence in support of their application for enrollment. They thus recognised his power to enroll them or to decline to do so. The power to hear necessarily involved the power to determine. Until their names were placed upon the roll and that roll was approved by the Secretary, the matter was *sub judice*, and no rights were acquired by applicants, and all proceedings and action in the premises were interlocutory. The enrollment being the final act, no rights were conferred by the proceedings referred to and, hence, none were afterwards taken away.

The report and recommendation made by Bixby to the Secretary of the Interior has been continually referred to as a "decision." It was not a decision in the judicial sense, but rather an advisory communication to his superior, for Bixby was merely an agent

or representative of the Secretary to aid him in discharging the duties imposed on him which previously had been performed by the Dawes Commission.

As the Court of Appeals said (R. 59):

> The appellants were given no right by the affirmance of Commissioner Bixby's decision. He did not hold an office created by statute. He had no powers but those given to him by the Secretary of the Interior. Until his action was approved by the Secretary, it had no legal effect. When approved it became the act of the Secretary. Even then it was nothing more than a declaration that the appellants were entitled to be enrolled. The statute under which appellants claim attached no legal significance to such a declaration. Their rights could come, not from a communication by the Secretary to one of his subordinates, like Commissioner Bixby, that in his judgment they were entitled to enrollment, but from the fact of enrollment, coupled with the Secretary's approval thereof. This is manifest from the act of March 1, 1901, supra, which says that the rolls "when approved by the Secretary of the Interior" shall be the rolls "upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Had the Secretary proceeded to enroll the plaintiffs in error and then, after approving the roll, had removed their names from the rolls without notice, a different situation would have been presented, for then rights would have become vested and the re-

moval of their names would have been similar to vacating a judgment or decree without notice and the decision of this court in *Garfield* v. *Goldsby*, 211 U. S. 249, would control.

There could be no question of deprivation of rights without due process of law until rights had attached; both courts correctly found that no rights accrued to these plaintiffs in error, and therefore the asserted constitutional ground for the writ does not exist.

This case is strikingly like that of *Brown* v. *Lane*, 232 U. S. 598. The question there was the right of the Secretary of the Interior to remove without notice or a hearing a member of the Osage tribal council. It was asserted that such action was unauthorized under the statute, and if authorized was void as repugnant to the due process clause of the Fifth Amendment. Denying the application for a writ of error, predicated upon paragraphs three and five of section 250 of the Judicial Code, this court said (p. 600):

> On the face of the record from a merely formal point of view it is apparent that the case as presented is embraced within both the third and fifth paragraphs. But it is elementary that where the jurisdiction depends upon the presence of controversies of a particular character or the existence of prescribed questions or conditions, substance and not mere form is the test of power and therefore even in a case where the requisite for jurisdiction formally exists the right to review does not obtain where it is evident that the formal questions as presented by the record are so wanting in substance as to cause them to be frivolous and devoid of all merit. *Consoli-*

> *dated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U. S. 596, 600, and cases cited. * * * *. Coming to test the existence of jurisdiction to review the controversy and consequently to determine whether the writ prayed for should be allowed we are clear that the propositions upon which it is asserted jurisdiction to review exists are so wholly unsubstantial and frivolous and devoid of all merit as to afford no ground whatever for the exercise of jurisdiction and the consequent allowance of the writ.

It is plain that the case does not come within the fifth clause of the section. The *validity* of the Secretary's authority is not challenged. Neither is the existence or scope of any power or duty of the Secretary of the Interior drawn in question within the meaning of the statute. On the contrary, both his authority and power are being invoked. The plaintiffs in error concede that the Secretary had power to determine whether they were entitled to enrollment. They surely proceeded upon that theory when they applied to reopen their case. Their contention is not that the Secretary could not determine their right to enrollment but is to the effect that once having reached a favorable conclusion he was without power to change his mind without notice.

A challenge of the power to hear and determine does not draw in question an authority exercised under the United States. *Philadelphia & Reading Coal & Iron Co.* v. *Gilbert*, 245 U. S. 162, 166.

The instant case is similar to the case of *Taylor* v. *Taft*, 203 U. S. 461, where Taylor sought a writ of mandamus to compel the Secretary of War to rein-

state her to a clerkship in the War Department from which she had been discharged. The petition recited sections 3 and 8 of Civil Service Rule II, and assigned as grounds of relief that the procedure relative to her dismissal was not in conformity with the executive regulations set out, in that no reasons for removal had been furnished her and also that the real reason for her removal was because of her political opinions and the expression of them. A motion to dismiss the writ of error for want of jurisdiction was granted, the court saying (p. 464):

> The relator did not, however, question the authority of the President or his representatives to dismiss her, if the required formalities had been complied with. What she claimed was that there were certain rules and regulations of the civil service which were not observed in the matter of her dismissal, and that, therefore, such dismissal was illegal.
>
> But this contention did not draw in question the validity of an authority exercised under the United States, but the construction and application of regulations of the exercise of such authority.

After referring to the case of *South Carolina* v. *Seymour*, 153 U. S. 353, the court quoted from the opinion in *United States* v. *Lynch*, 137 U. S. 280, thus:

> The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed.

Here, the plaintiffs in error complain because the Secretary did not notify them of his intention to vacate his so-called decision. But it is difficult to perceive how this prejudiced them, for it appears (R. 51) that the records in the office of the Superintendent for the Five Civilized Tribes fail to show that any notice of this tentative action of the Secretary was, or should have been, given to the parties concerned.

Indeed, it appears (R. 51) that Bixby had no knowledge of the letter of the Secretary of February 19, 1907, until after he received the telegram of the Secretary of February 23, 1907, instructing him to consider the Johnsons' application in the light of the Attorney General's opinion in the *West* case. 26 Op. A. G. 127, 150.

This court also considered paragraph five of section 250 in the case of *United States ex rel. Champion Lumber Company* v. *Fisher*, 227 U. S. 445, and said (p. 451):

> In clause five of section 250, under consideration, the added ground of appeal is given if the existence or scope of any power or duty of an officer of the United States is drawn in question. Within the meaning of this statute, was any such validity or existence or scope of authority drawn in question? It appears that the petitioner contended that no protest was pending in the Department which could rightfully justify the withholding of the patent. The officers of the United States took issue upon

this allegation, and the Court of Appeals decided that there was testimony before the Secretary authorizing the exercise of the discretion conferred by law to withhold the patent, and upon that ground affirmed the decision, refusing the writ. The case was therefore submitted and decided upon the issue whether the action of the Secretary was justified in the exercise of his lawful discretion because of the facts disclosed in the record. The petitioner did not challenge, nor did the court pass upon, the validity of any authority exercised under the United States, nor was the existence or extent of the authority or duty of an officer of the United States drawn in question in the sense in which it is used in the statute, that is, brought forward and made a ground of decision. The statutes under which the officers of the United States acted were concededly valid, and the authority exerted was lawful and within the powers of the officers, if the facts justified their action. The petitioner's real attack upon the action of the Secretary and Commissioner was because the facts shown did not warrant the exercise of the power given by law. The decision of that issue, upon which it is clear the case turned, neither involved nor decided the questions which made the case appealable to this court under the fifth clause of Section 250 of the Judicial Code.

It follows that the writ of error should be dismissed.

II.

The Questions presented in the case are so well settled that the prosecution of the Writ of Error is frivolous.

The courts below decided that the question whether plaintiffs in error should be enrolled was one calling for the exercise of judgment and discretion by the Secretary of the Interior, and hence, under numerous authorities, mandamus would not lie to coerce his judgment.

There is no dispute that the question of enrollment was one coming within the jurisdiction of the Secretary of the Interior. The plaintiffs in error invoked that jurisdiction and their complaint at heart is of the finding that they should not be enrolled. Until enrollment, the proceedings were *in fieri* and the matter was one calling for the exercise of judgment and discretion. That mandamus will not lie in such case is well settled. *Ness* v. *Fisher*, 223 U. S. 683, 691–694, and *Louisiana* v. *McAdoo*, 234 U. S. 627, 633, are two of the later decisions of this court, reiterating the rule.

III.

The case is now moot.

Even conceding that under a proper construction of the law these plaintiffs in error were entitled to enrollment, the questions presented are moot. The Secretary of the Interior, under the act of April 26, 1906, is stripped of jurisdiction to now make

additions to the rolls. That act, as cited above (p. 2), provided that *the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person* after March 4, 1907. To award mandamus now would be to command the Secretary to do what Congress has declared he has no jurisdiction or power to do.

Mandamus confers no new authority; the party to be coerced must have power to perform the act. *Reeside* v. *Walker*, 11 How. 271, 288, 289; *Brownsville* v. *Loague*, 129 U. S. 493, 501; *Boynton* v. *Blaine*, 139 U. S. 306, 319; *Laclede Gas Light Co.* v. *Murphy*, 170 U. S. 78, 95; *United States ex rel. Siegel* v. *Board of Liquidation of New Orleans* (C. C. A.), 74 Fed. 489, 492.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals was correct and should be affirmed.

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